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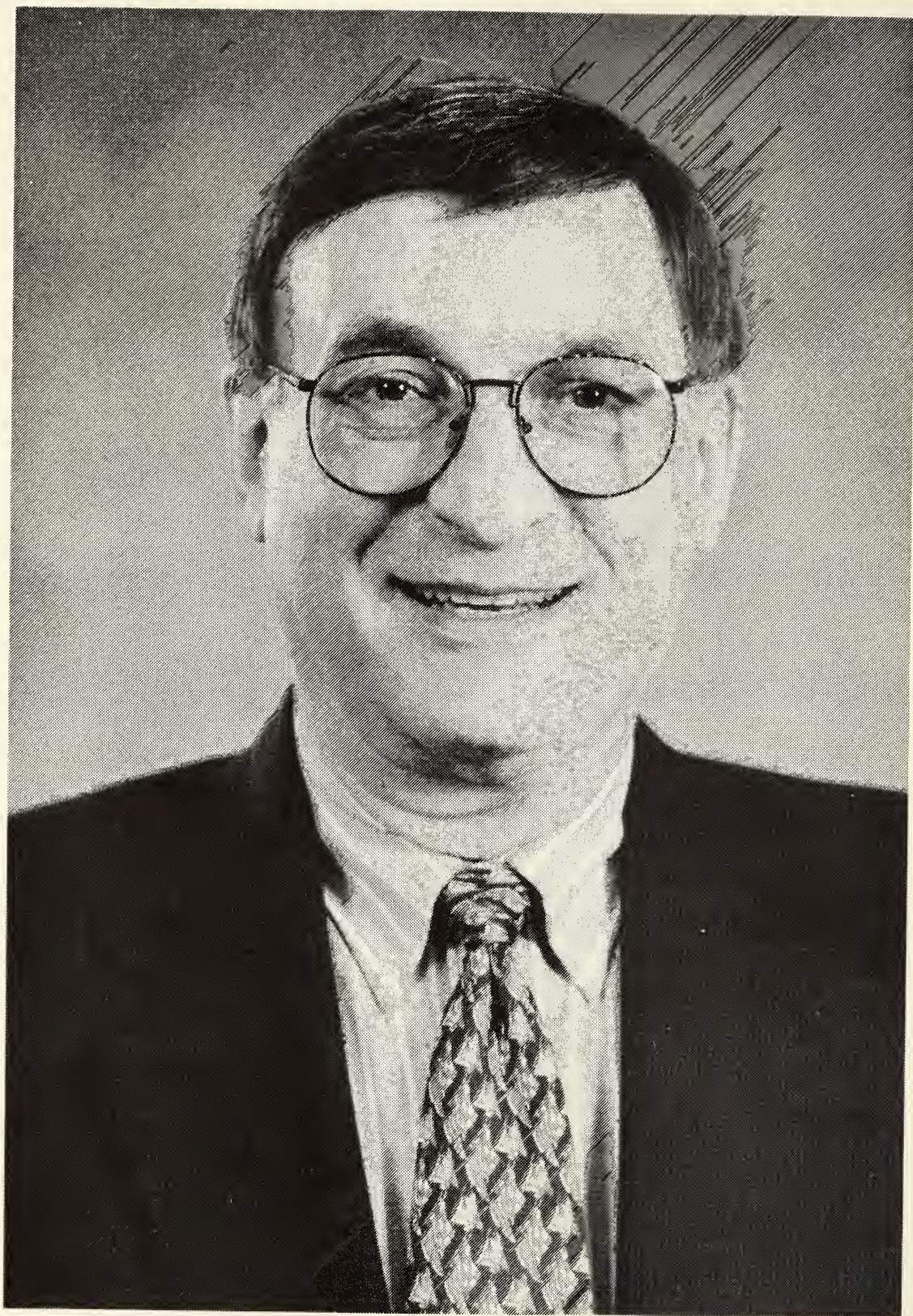
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HAROLD GREENBERG

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TRIBUTE TO HAROLD GREENBERG

NORMAN LEFSTEIN*

After completing more than twenty-five years as a faculty member of the Indiana University School of Law at Indianapolis, Harold Greenberg retired at the end of December 2002. His legacy of solid teaching, scholarship, and service will endure.

Harold and I overlapped in our tenure at the law school, as he was a member of the faculty when I became dean of the school in 1988. At the time, he was one of the school's seasoned faculty members, and he was someone upon whom I learned I could always rely.

First and foremost, I knew that I could always count upon Harold in the classroom. Throughout his career at the law school, he was a mainstay of the law school's contracts and commercial law curriculum. Early in his career he also taught administrative law and in recent years, due to his keen interest in sports and entertainment law, he developed the law school's course in that area.

His student evaluations were consistently positive, his classes were popular, and students elected to take his courses when the opportunity was available. In short, Harold was a first-rate teacher. I was told many years ago by the former dean of my law school that "the first duty of a law professor was to be a good teacher." Harold's teaching exemplified that admonition.

But his teaching was not limited to the classroom. Because he enjoyed teaching so much, for many years he lectured at continuing legal education programs, usually on contracts and commercial law subjects. He also was a frequent lecturer at one of Indiana's bar review courses.

Harold's teaching at the law school did not stop at the classroom door. He was interested in students and dedicated to their advancement. This was evident to me on the many occasions when I saw him visiting with students in his office, in the halls of the school, and over coffee.

Harold's dedication to students was most evident in his commitment to the law school's moot court program. Beginning in 1980 until his retirement, Harold served as adviser to the school's Moot Court Society. During the past several years, he shared the responsibility with another faculty member, who was groomed to take his place. Under Harold's tutelage, there was significant growth in the number of students participating in moot court, so that today it is one of the

* Professor of Law and Dean Emeritus, Indiana University School of Law—Indianapolis. LL.B., 1961, University of Illinois College of Law; LL.M., 1964, Georgetown University Law Center.

school's largest co-curricular activities.

Teams fielded by the program also prevailed in many competitions. For example, for four consecutive years, from 1992 through 1995, teams from the school's Moot Court Society were regional champions of the ABA National Appellate Advocacy Competition, which was no minor league feat. With each of these victories, Harold delighted in telling me of the success of the school's teams.

I spoke with Mitzi Martin, a partner at Baker & Daniels, about Harold's importance to the school's Moot Court Society, which Mitzi headed as Chief Justice in 1984-85. She credited Harold's "incredible enthusiasm for moot court and encouragement of students" as critical to the program's success. Due in no small measure to Harold, she explained that moot court was "the single most rewarding facet of her law school experience." Mitzi volunteered that there are many graduates of the school's program who attribute a measure of their professional success to their involvement with moot court.

Harold also was a scholar. In addition to a book on Article 2 of the Uniform Commercial Code, he frequently published law review articles dealing with a range of UCC issues. He also prepared teaching materials for his course in Sports and Entertainment Law, as well as written materials for his frequent continuing education lectures.

One aspect of Harold's career at the law school is undoubtedly unknown to persons who have not served on the faculty. During all of his years as a faculty member, Harold served as the faculty's secretary. That role suited Harold fine, just as it did his faculty colleagues. It meant that the faculty could count on minutes of faculty meetings being accurate, of sufficient length, and prepared in timely fashion.

As secretary, Harold also oversaw various sensitive faculty votes related to hiring and the election of persons to serve on the Executive Committee of the faculty. Because he enjoyed the complete trust and confidence of his colleagues, these were tasks that everyone was glad to entrust to Harold.

It is not surprising that Harold has contributed in so many important ways to the law school. Based upon his academic success as a student, it was entirely predictable. Harold obtained his undergraduate degree *summa cum laude* from Temple University and his law degree from the University of Pennsylvania, graduating third in his class. After law school, he clerked for a prominent justice of the Pennsylvania Supreme Court and practiced law in Philadelphia. By the time he joined the school's faculty, he was an experienced practitioner and a partner in a Philadelphia law firm.

Although Harold has retired from the law school, he has not stopped teaching. During the spring semester of 2003, he was welcomed as a visiting professor at a law school in a climate much warmer than Indianapolis. For the next several years he plans to visit at other law schools, and these schools—wherever they may be—will be fortunate to have his services.

In addition to teaching, Harold undoubtedly will continue with some of his other favorite pastimes, including theater, sports, and travel to England. The love for his pedigreed dachshunds will surely continue as well.

Meanwhile, the law school to which he contributed so much will miss his steady contributions, and his faculty colleagues will miss his constant good cheer. We join with his former students in offering thanks to Harold for a job well done and in wishing him well.



JAMES F. BAILEY, III

A TRIBUTE TO PROFESSOR JAMES F. BAILEY, III, AND A REVIEW OF HIS WORK

WILLIAM F. HARVEY*

When a person holds a joint appointment as a law school librarian and a law school professor, when he is tenured in both the faculty tenure system for the law school and in the Indiana University library system, by what standard is he reviewed and remembered? Rather clearly, two are available. The first measures him as a professor of law. Professor James F. Bailey, III is a meticulous scholar who taught International Law, Legal Bibliography 1 and 2, Law and Development in the Hispanic World, and Lexis and Westlaw. He taught these courses well, and he was highly appraised by his students and his peers. He was an Exchange Scholar from Indiana University to Universidad de Sevilla, in Seville, Spain, and to Eotvos Lorand University of Budapest, Hungary. He graduated from the University of Michigan with a B.A. degree, (after he was admitted to Phi Beta Kappa) and then from the law school at the University of Michigan. He has important and extensive publications in multiple volume sets.

There is more. He is a linguist. He is bilingual in English and Spanish, and he works reasonably well in French, German, Italian, Portuguese, Swedish, Dutch, Norwegian, Danish, and Catalan.

The second reviews his thirty years as the Indiana University School of Law at Indianapolis Law Librarian—perhaps this was first for Professor Bailey, and his law professorship was second, even though each has been an almost total commitment.

Another question appears: how does one review thirty years of work as the law school's librarian?

C. Taylor Fitchett, the director of the University of Virginia Law Library, suggests an historical inquiry. She states that Frances Farmer, her predecessor at Virginia's Law Library,

would not recognize her library [at Virginia] today. A couple of decades ago, when she was librarian, there was no LexisNexis or Westlaw and no Internet—just books that numbered in the thousands rather than the hundreds of thousands. Independent publishers of U.S. legal materials thrived, and most of them actually resided in the United States. Document delivery took weeks instead of minutes¹

Like Virginia, three decades ago, this law school's library did not have

* Dean Emeritus and Carl M. Gray Emeritus Professor of Law, Indiana University School of Law—Indianapolis.

1. C. Taylor Fitchett, *Information Anxiety: Librarians Lend Lawyers a Hand*, VA. LAW., Dec. 2002, at 21. Frances Farmer, Virginia's great law librarian, was a professional friend. Discussions with her were memorable because she was so well-informed, and because she was "old school" or "all Virginia." In remembering her, I am reminded of the statement "To Be A Virginian: Either by Birth, Marriage, Adoption, or even on one's Mother's side, is an Introduction to any State in the Union, a Passport to any Foreign Country, and a Benediction from Above." The author was anonymous, but Frances Farmer was the essence of the statement.

LexisNexis or Westlaw or the Internet. (It did have one gasping photocopy machine that it did not own.) Unlike Virginia, it did not have sufficient books to sustain the day and night school students in their work and study. Much worse, there were no active plans to get them or to remedy these conspicuous deficiencies.

In addition to understanding the law school library in 1974 when Professor Bailey arrived, his evaluation requires awareness of the library's history, the conduct of the University administration when the law school would live or die with its library, the demands, issues, and crises that confronted him upon arrival, and whether there is an appreciation of his work in that context.

Upon his arrival in 1974, major problems threatened the library and the school's future. They were:

1. Between 1944 and 1970, there was no day division in the law school. When Indiana University bought the Indiana Law School in 1944, an outstanding private law school with a day and evening division,² it closed the day division. It remained closed until, at the law school faculty's insistence, a day division was opened in 1970. This was two years after the law school reestablished an autonomous administration that was separate from the IU Bloomington law school.

The day division came "online," so to speak, with several major problems. The greatest was the fact that no plans were made for creating a law library that would support the day division. At that time, the library barely sustained classes in the evening division of the law school.

Between 1968 and 1973, before Professor Bailey's arrival, the law school administration did not request a dime's expansion in the law school's library budget. The University administration offered none other than a routine increase, if that, and at that time IUPUI was little more than someone's pipe dream.

Of course the University administration was delighted with the very large increase in tuition fees and charges that the new day division provided. It should have been pleased. In reopening the day division, the law school had by far the largest student enrollment (in total number of students and in enrolled hours

2. In general, the Indiana Law School's history in Indianapolis runs to the decade of the 1890s. Before that time, it was the law school of DePauw University in Greencastle, Indiana. At DePauw, it seems to have existed from a time that preceded, probably, the Civil War. It was a successful part of DePauw University. However, about 1890, for reasons that remain unclear or not researched, it was closed. The faculty moved that law school from DePauw to Indianapolis. They formed a private corporation and reopened the school. Years later, the Indiana Law School acquired the Benjamin Harrison Law School, also a private law school in Indianapolis, and it was the leading school of law in Indiana. During World War II, its student enrollment dropped to very few. If it had sustained itself until the fall of 1945, there would have been too many students to enroll. The IU Law School in Bloomington did not have more students enrolled in 1944 than the Indiana Law School, but it did have a lifeline to state money. With pockets filled with state-supplied cash, IU saw its chance and stepped in to buy the school. Considering the assets and reputation of the Indiana Law School, IU paid, it seems, about five cents on the dollar. One might speculate whether the Robber Barons ever "grabbed as much on the cheap."

computed on a Full Time Equivalent (FTE) basis) among the four Indiana law schools. It was all gain, no cost, and no commitment: a university president's or other high university administrator's notion of paradise.³

2. A policy of the Trustees of Indiana University opened its libraries to the public. This was a grand idea and a policy easily implemented if one were in Monroe County, Indiana, where IU's main campus at that time was located. In that bucolic community, if twenty non-student persons entered the law library in a calendar year, it would have been astonishing. In Indianapolis, however, over fifty lawyer, non-lawyer, and non-student library patrons arrived each day of the week.

Moreover, because the building and the physical library facility were excellent (and beautiful) medical students from the IU School of Medicine soon found their way into a seat in the law library for valuable hours of sound and silent study. They were welcomed, and the almost non-existent law library administrative staff did the best it could to shoulder this additional burden.⁴

In that year, the University's campus chancellor was a medical doctor. He was a former dean of the University's medical school. He understood that students who used a library had to have a seat in which to sit. If the law school library provided a seat for medical students, then that was the purpose of a law library.

3. The Indiana Legislature meets in the State Capitol. It is less than a mile from the law school and its library. It seemed that every staff person who worked in the Legislature needed assistance from the library or its facility and library assets, such as they were. Fortunately, many of those persons were law students who understood the enormous strain that these conditions imposed on a very limited facility.

4. These conditions existed without email, personal computers, CD ROM, LexisNexis, Westlaw, Microsoft or Apple, and all related research instruments.

3. Some of the details are these: The book budget in Professor Bailey's first year was \$70,000 compared with a book budget today of about one million dollars and an annual expenditure of more than two million for *all* library purposes. To give some perspective on these figures, the 1973 book budget was *half* the book allocation at Wayne State University, from which Professor Bailey came. Even with \$140,000 in Detroit, it was exceedingly difficult to maintain a decent collection, and the meager \$70,000 book budget in Indianapolis was particularly crippling to the law school's programs. As indicated in the text of this review, all informed faculty and the law school administration were especially concerned about this unfortunate situation because the American Bar Association settled upon a full accreditation inspection in the fall of 1974, after postponing the inspection for a year and a half—during which the cumulative conditions in the law library became worse and worse and the peril of disaccreditation grew and grew.

4. The staff was not adequate to provide appropriate support for law school programs. There were three and a half librarians: Susan Taylor, Chris Stevens, Barbara Rainwater (half-time as reference librarian), and Bailey. In addition, there were only four clericals (secretary, serials, loose leaf filing, and U.S. government documents). Funding for staffing was so limited the library had no full-time person to cover the circulation desk; rather, this vital function was staffed only by persons paid from the part-time wages budget.

5. Prior to 1974, the law library possessed nothing in microform.

6. Finally, and not least, the law school confronted an ABA accreditation in 1974, one that had been postponed from 1972-73 during the time when the school's dean and administration were changed. In the law school, one concern was anticipated: the law library could not long sustain the demands placed upon it.⁵

As Professor Bailey and a few others, including important and informed law school alumni, knew, there was no direction to go other than "up." These conditions generated decisions and a determination to exceed minimal standards and to build a great law library.

Immediately, major efforts were made. The following events occurred, and none was related to or caused by the ABA accreditation activity:

A. In 1974, the Indianapolis Foundation made a \$30,000 matching grant to the law library, the first such grant ever given to a public institution. It was clear recognition of the stark financial condition in which the law school and the library found themselves. Almost immediately, this grant was matched through generous giving by law school alumni.

B. The late, great Professor John S. Grimes donated \$10,000 to the library for the purchase of materials on legal philosophy.

C. Professor Bailey made arrangements to receive sets of legal materials collected and distributed gratis by the U.S. Library of Congress. Alumni in the Washington, D.C. area carefully monitored the availability of these materials and, with Professor Bailey, made certain that they were directed to the law library in Indianapolis.

D. West Publishing Company "came to the rescue" through very generous financial terms provided by Mr. Arnold O. Ginnow, its Executive Vice President, and Mr. David Little, its regional manager. The law school, its library, and Indiana University very greatly benefited from them. In addition to being important corporate executives, they were first-class legal scholars, editors, and lawyers.

Within the year, the library expanded its holdings from about five state digests to all forty-eight states available. Legal research projects could now be divided among fifty states, and the intense usage and concomitant deterioration of basic materials were no longer focused on three or four states. Additionally, the library secured all state legal encyclopedias, multi-volume practice sets, jury instructions, official state court reports published for a number of states by West, and hundreds of hornbooks and treatises.

E. Indiana Chief Justice Norman Arterburn, also a first-class legal scholar, judge, and lawyer, arranged with me as the law school's dean to have the entire British Commonwealth Collection of the Indiana Supreme Court Library relocated to the law school's library. This was done in the summer of 1974,

5. During that ABA accreditation visitation, it seemed to the law school administration and other informed persons that the ABA wanted to establish its own agenda for legal education in Indiana and use the law school's accreditation as an instrument for that objective. As a result, 1974 was merely the beginning of this activity. See *infra* note 7.

adding thereby more than 10,000 volumes to the library collection. Some of these materials were rare and out of print items.

In short, the library's United Kingdom holdings were immeasurably improved, as were the collections for Australia, Canada, Ireland, New Zealand, and South Africa.

F. Additionally, the Indiana Supreme Court determined that the best place for its treatise collection was at the law school. Retaining only the most up-to-date materials needed on its premises, the court sent hundreds of boxes of nineteenth and twentieth century treatises to the law school. The library's research collection was incredibly enriched by thousands of new acquisitions, most of which were legal classics of their time and definitely out-of-print.

At that time, Chief Justice Arterburn explained that for years his court had been a depository of the Supreme Court of the United States. As a result, the U.S. Supreme Court's bound briefs and records were deposited in the IU Law Library in Bloomington, where they remain to this day. If his court could do this for Bloomington law, the chief justice reasoned, it could extend the same treatment to Indianapolis law. Since that time, Indianapolis law has given extraordinary protection to the court's Commonwealth Collection.

G. In 1977, the law library was designated a full depository for United Nations publications, an envied and unique status held by not more than half-a-dozen law school libraries. Depository status provided a great boost for collection growth and provided a solid research collection when, some years later, the *Indiana International and Comparative Law Review* was founded. As the recently established Center for International and Comparative Law begins its work, it will have an excellent international and comparative collection on which to build its future efforts.

Today, the library also possesses a small but impressive rare book collection. The oldest item is a 1577 original of Fitzherbert's *Graunde Abridgement*, published in the reign of Elizabeth I. Other rare titles include laws and constitutions of the Native American peoples (some written in Cherokee or Choctaw with the matching English on facing pages), the Revised Statutes of Indiana published in German for the mass of newly arrived immigrants, legal publications from Hawaii when it was an independent Polynesian kingdom, the ancient Hindu Institutes of Manu, and Eighteenth Century English and Irish legal materials (including reprints of the Domesday Book of William the Conqueror). Today's library's Rare Book Room provides a suitable temperature and humidity controlled home for these wonderful ties to the past.

Except for part (D), all of the major additions that parts (A) through (G) describe cost Indiana University nothing. The cost of purchase of the materials described in part (D) was spread across the next three budget years, without a penny of interest or shipping costs.

Cost-free, major library acquisitions usually cause high university administrators to smile or experience contentment—if their keen sense of envy does not overwhelm them.

H. The library was the first law school library in Indiana to offer Lexis and Westlaw terminals. At an early date, Professor Bailey was a leader in seeing that Lexis and Westlaw classes were made a mandatory part of the regular legal

research and writing program. In those early days of automation, librarians invested countless hours in small-group classes, providing hands-on training in automated legal research. How it has changed since then! The library now offers three state-of-the-art computer class/workrooms; there are data and power outlets at every library carrel; many students own their own laptops; and the competing database owners provide on-site instructors!

I. Additionally, the library was the first law school library in the state to have its own OCLC (library utility consortium) terminal whereby book and serial cataloging was automated. As a result of our early entry into these automated procedures, and the devoted labors and great expertise of our catalog librarians, this library was one of only three or four in the entire nation that was invited to contribute its cataloging to a national data base of the U.S. Library of Congress. In short, this library's high quality work (along with a few other libraries) was recognized and served as a national standard. No other law library in Indiana (and few in the region) has received such an honor.

J. A substantial microform collection was commenced. It has grown to the equivalent of about 200,000 volumes and includes virtually all Congressional publications from the 1700s to date, records and briefs of the U.S. Supreme Court from the beginning, and an extensive civil law collection (France, Spain, Germany, et al.). It has a fine collection in canon law, thousands of recommended treatises, and an extensive collection of international law texts, treaties, and European Community publications.

As a result of these major activities, when the year 1979 closed, the law school's library was the twenty-third largest in the United States, and it was the finest law library collection in the history of Indiana. This was no mean achievement. The person who superintended this effort was Professor James F. Bailey, III.⁶

The six years beginning in 1974 and ending with 1979 were among the most innovative, creative, and productive years in the law school's history.⁷ They

6. In those years, the law school administration gave total support to this development. During that time, there were but three deans. In addition to myself, there were Associate Dean G. Kent Frandsen and Associate Dean Marshall J. Seidman, whose support and assistance were invaluable. They, Professor Bailey, some committed faculty and several alumni, the law school's Board of Visitors, and three University Trustees assured the law school's future.

7. The ABA accreditation process continued from year to year. It reminded me of the great Dickensian novel, *Bleak House*, or that part of *Bleak House* that identified the story of a public wrong: delays in the English Court of Chancery. Those delays are illustrated by the court action of Jarndyce and Jarndyce. About that suit, the author said

[it] drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce, without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant, who was promised a new rocking-horse when Jarndyce and

brought a law library from essentially nothing into excellence and greatness. They are a tribute to and a review of the work of Professor James F. Bailey, III. This is the measure of the man that remains in my memory. It is a very fond recollection.

Anecdotal Moments

There are several. Some are interesting, some humorous, and some describe the times:

One amusing story from the last thirty years has to do with copy machines in the library. Prior to Professor Bailey's arrival in 1974, the law school faculty had set up a corporation to lease and maintain a copy machine in the library. (That's how short funding really was!) Actual copying was maddeningly slow, and paper copies were so glossy one could not write on them. But copies were made. Once expenses were paid, proceeds from the copy machine were set aside for student scholarships. Now, nearly thirty years later, the library has several dozen state-of-the-art copy machines, some of which copy simultaneously on both sides, collate pages, print on colored paper if desired, and create a final product in mere seconds.

In this true story, two things seem to appear: a faculty that considered students first, which is always a happy moment, and the evolution of photocopy machines.

The library has had its disconcerting events. One remembers a time when library staff came running with the tale that someone had climbed over the second floor balcony railing and was tottering inches from a serious fall, singing and laughing. Security was called. The fellow was pulled back. It was discovered that, because he had not taken his insulin that morning, he was suffering from diabetic shock.

The library also had its cast of characters. Another library story concerned a person who seemed to work as a lawyer, on and off in the Lawyers' Room, during almost all of the hours the library was open. This continued for a rather

Jarndyce should be settled, has grown up, possessed himself of a real horse, and trotted away into the other world. Fair wards of court have faded into mothers and grandmothers; . . . there are not three Jarndyces left upon the earth perhaps; . . . but

Jarndyce and Jarndyce still drags its dreary length before the court, perennially hopeless.

CHARLES DICKENS, *BLEAK HOUSE* 4 (P. F. Collier & Sons, New York, 1911).

And so it seemed with the ABA's inspection. On a daily basis, it consumed time, energy, and money until 1978. Then it summarily ended with a letter of full accreditation. This followed a sincere and effusive apology from the chairman of the inspectors' superintending committee, who was also a federal district judge in Chicago. The apology was extended in a personal conversation in his office in the Dirksen Building in Chicago after all facts and circumstances were made known to him.

The creation of a great law library was not the result of the ABA's activity; it occurred in spite of it.

long time. He was well kempt, dressed in clean shirt and blue jeans, and carried a lawyer's black briefcase. No one doubted he was an attorney as he greeted people upon entry to the library, inhabited the Lawyers' Room for significant periods of time, and used the local-only telephone for what appeared to be business calls. But he was role-playing, for reasons that were never known. He was caught in his masquerade when he approached Professor Bailey with the story that a friend of his produced movies and wanted to use the law school as a setting. Somewhat interested at first, Jim became more and more suspicious as the tale became more elaborate and involved. When the library checked with the campus police, it turned out that the man was a well known street person who was already banned from other IUPUI buildings.

Last but not the least, Professor Bailey was deeply involved in keeping the law library independent and responsible directly to the law school dean and faculty. Because of an earlier experience in Detroit, Jim at once identified a bureaucratic power play to remove much of the law school's control over the library and transfer it to a Bloomington locus. He brought the matter immediately to my attention.

Together we fended off the attempt to merge the law library's administration into a system where lines of authority ran not to the law school dean but rather to an administrator located on the Bloomington campus. He was a man not known to either of us. However, his feelings reached such a sore point that word came back to Jim and me that this non-law administrator was going "to punch us in the face if he ever ran into us, and we had better stay out of Bloomington."

Neither of us was "punched out." Each of us went to Bloomington when regular university business required. However, for some reason, one had a feeling that the movie classics *Shane* or *High Noon* should have been reintroduced for showing on the Bloomington campus, or that they should have been made available to that Director of the IU Libraries.

SYMPOSIUM

REEXAMINATION OF THE BENEFIT OF PUBLICLY FUNDED PRIVATE EDUCATION FOR AFRICAN-AMERICAN STUDENTS IN A POST-DESEGREGATION ERA

KEVIN D. BROWN*

Almost fifty years have elapsed since the Supreme Court rendered its historic opinion in *Brown v. Board of Education*.¹ That opinion launched American society into the desegregation era and became the catalyst for astonishing changes in race and race relations. Yet, despite the obvious advancement in race relations, our national agenda is still unable to escape conscious deliberations on racial matters. America is torn between recognizing and congratulating itself for unmistakable progress in eliminating its historic subordination of racial and ethnic minorities and being demoralized and dispirited over a lack of success.

As the Twenty-first Century unfolds, it is clear that America has moved into a post-desegregation era. The assimilation vision forged during the turbulent 1950s and 1960s—with its emphasis on integration and racial balancing as solutions to racial conflicts—has run its course. Throughout the country, school desegregation decrees issued in the 1960s, 1970s, and 1980s, which were one of the most important means used to desegregate American society, are being terminated. In addition to the termination of court-ordered integration, a number of lower federal courts have recently struck down the use of racial classifications to foster racially integrated student bodies in voluntary school desegregation plans. Federal courts, which had encouraged the use of such plans during the desegregation era, have reversed their position. They are finding the use of racial classifications in such plans to constitute violations of the Equal Protection Clause.²

* Professor of Law, Indiana University School of Law. B.S., 1978, Indiana University; J.D., 1982, Yale University School of Law. The author would like to thank Vivek Boray for his outstanding research assistance that contributed so much to this Article.

1. 347 U.S. 483 (1954).

2. See, e.g., *Eisenberg v. Montgomery County Pub. Schs.*, 197 F.3d 123 (4th Cir. 1999); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999); *Wessman v. Gittens*, 160 F.3d 790 (1st Cir. 1998). District courts in Ohio and North Carolina have also addressed this issue. See *Capacchione v. Charlotte-Mecklenburg Schs.*, 57 F. Supp. 2d 228 (W.D.N.C. 1999); *Enrollment Ass'n v. Bd. of Educ.*, 937 F. Supp. 700 (N.D. Ohio 1996). But see *Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738 (2d Cir. 2000) (upholding a voluntary school integration plan); *Hunter v. Regents of the Univ. of Calif.*, 197 F.3d 123 (4th Cir. 1999) (upholding a voluntary

It is too early to tell how the Supreme Court's decision regarding the University of Michigan Law School's affirmative action program in *Grutter v. Bollinger*³ will apply to efforts to use racial classifications to promote voluntary integration by public elementary and secondary schools. This is a subject of a detailed article that I am currently working on. *Grutter* could have a beneficial effect on voluntary integration plans. The Supreme Court held that racial classifications could be used in an individualized admissions process as a means to pursue a diverse student body. If this holding without being significantly broadened is applied to elementary and secondary schools, then it will provide for the institution of some voluntary integration plans. It will not, however, restrict voluntary integration plans which tend to reflect more of a desire for racial balancing.

The logic that dictated resolutions to racial and ethnic conflicts of the 1950s and 1960s in public education no longer seems to apply. Now is a good time to revisit the solutions of the 1950s and 1960s to racial and ethnic conflicts with the benefit that comes from fifty years of experience with desegregation and the realization that the desegregation era is over.

In this Article I will look at one aspect of the changing landscape regarding race and education. I will revisit the issue of public funding for private school education and school vouchers, but I will do so from the perspective of the African-American community in this post-desegregation era.⁴ I choose the

school integration plan on very narrow grounds). One other recent district court case deserves to be mentioned. In *Hampton v. Jefferson County Board of Education*, 102 F. Supp. 2d 358 (W.D. Ky. 2000), parents of students brought an action seeking to dissolve the school desegregation decree covering Jefferson County, Kentucky. *See id.* at 359-60. The court held that the school district's good faith compliance with a desegregation decree for twenty-five years warranted dissolution. *See id.* at 377. After the court determined that the school district had eradicated the vestiges of its prior de jure conduct, the court then addressed the continued use of racial classifications by the Jefferson County Public Schools to determine admissions to its various schools. *See id.* at 360. The district court concluded that the "voluntary maintenance of the desegregated school system should be considered a compelling state interest." *Id.* at 379. The court noted that "it [was] incongruous [for] a federal court ... at one moment [to] require a school board to use race to prevent resegregation of the system, and at the very next moment prohibit that same policy." *Id.* The court determined that "[a]s among basically equal schools, the use of race would not be a 'preference.'" *Id.* at 380. Thus, the School Board "would not be prohibited from using race in its general student assignments to maintain its desegregated school system, even to the extent of some racial guidelines." *Id.* But with respect to the school district's magnet programs, the situation was different. *See id.* They offered educational "programs that are not available at other high schools." *Id.* Thus, this is not a situation where the education was fungible. *See id.* at 380-81. As a consequence, the court required the School Board to revise its admissions policies at its magnet schools. *See id.* at 381.

3. No. 02-241, 2003 U.S. LEXIS 4800 (U.S. June 23, 2003).

4. I want to make it clear that my personal preference is for racially and ethnically integrated schools based upon true multicultural education. I write this comment, however, in recognition that American public education is in an era of resegregation and not increased racial and ethnic

perspective of the black community because from the very beginning school desegregation was described as primarily for the benefit of black school children and the rest of the black community.

Important social values tend to take on a life of their own. Often they arise as the solution to a significant social conflict and afterwards become sustained by bonds of traditions. There is always value as a critique in going back to the beginning of the generation of a significant social value and pointing out the actions, the deviations, or the calculations that gave rise to it. This tends to be the first step in the process of the reevaluation of the value and assessing whether it still retains its merit in light of new social conditions.

The first widespread use of public funding of private education occurred in efforts by white segregationists to prevent integration of the public schools. School vouchers were initially understood as efforts to maintain the system of segregation and the concomitant oppression of the black community. So many changes have occurred in the last twenty years regarding the interpretation of the Equal Protection Clause and the educational situation of black school children, however, that a reexamination of school vouchers that takes into account these new developments will present this issue in a completely different social context.

Another reason that now is a good time to reexamine the issue of school vouchers from the perspective of the black community is the Supreme Court's opinion in the summer of 2002 in *Zelman v. Simmons-Harris*.⁵ Due to the efforts

integration. Thus, I write this comment with heavy heart because I recognize that the educational world that I would like to come into existence will not occur.

5. 536 U.S. 639 (2002). In *Zelman*, the Supreme Court addressed a pilot program set up by the state of Ohio designed to provide educational choices to families with children who reside in the Cleveland City School District. In 1995, a federal district court declared a "crisis of magnitude" and placed the entire Cleveland school district under state control. See *Reed v. Rhodes*, 1 F. Supp. 2d 705 (N.D. Ohio 1995). Not long after the court acted, the state auditor found that Cleveland's public schools were in the midst of a "crisis that is perhaps unprecedented in the history of American education." See *Zelman*, 536 U.S. at 644 (quoting Cleveland City School District Performance Audit 2-1 (Mar. 1996)). The Cleveland school district had failed to meet any of the eighteen state standards for minimal acceptable performance. The condition in the schools was so bad that only one in ten ninth graders could pass a basic proficiency examination. Students at all levels performed dismally when compared with students in other school districts in Ohio. The graduation rates in Cleveland were also horrific. More than two-thirds of high school students failed to graduate. A full 25% of the students who reached their senior year still failed to graduate. Few of the graduates of Cleveland schools could read, write, or compute at levels comparable to their counterparts in other cities.

The State of Ohio responded by passing a law that provided for a program to provide financial assistance to families in any Ohio school district that is or has been under federal court order requiring supervision and operational management of the district by the state superintendent. Cleveland is the only Ohio school district to fall within that category. There are two basic kinds of assistance provided for students and their parents. First, tuition aid is provided for students in kindergarten through third grade, expanding each year through eighth grade, to attend a participating public or private school of their parent's choosing. Second, the program provides

of southern segregationists to thwart school desegregation, when public funding of private education was first proposed it was viewed primarily as a constitutional issue dealing with the Equal Protection Clause. Federal court hostility to school vouchers and the growing acceptance of the obligation to desegregate public schools moved the school voucher issue into the background. The issue of school vouchers reemerged during the 1980 presidential campaign when it was championed by Ronald Reagan.⁶ By this time, Supreme Court opinions interpreting the Establishment Clause of the First Amendment in the 1970s had created new concerns about the constitutionality of school vouchers. As a result, for much of the past twenty years the legality of school vouchers has been discussed primarily in terms of religious liberty. In *Zelman*, the Supreme Court affirmed the constitutionality of a voucher program adopted by the state of Ohio to benefit certain students in the Cleveland public schools against an Establishment Clause challenge.⁷ The Supreme Court's opinion may not be the last word on the issue of public funding of private school choice. It appears, however—at least for now—that a well crafted school voucher proposal can

tutorial aid for students who choose to remain enrolled in public school.

Any private school, whether religious or nonreligious, can participate in the program so long as the school is located within the boundaries of a covered district and meets statewide educational standards. These private schools must agree not to discriminate on the basis of race, religion, or ethnic background, or to advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion. Public schools that are located adjacent to a covered school district can also participate in the program. The tuition aid plan provides a maximum benefit of \$2250 to low income students and \$1875 to other participants in the program.

In the 1999-2000 school year, while none of the adjacent public school districts decided to participate in the program, fifty-six private schools participated, forty-six (or 82%) of which had a religious affiliation. Over 3700 students participated in the scholarship program with 96% enrolled in religiously affiliated schools. A General Accounting Office report of the program filed for the 1998-99 school year revealed that 70% of families with children participating in the program were headed by single mothers, with average family incomes of \$18,750; 73.4% of the children who participated were minorities and 26.6% were white. United States General Accounting Office, *School Vouchers: Publicly Funded Programs in Cleveland and Milwaukee*, GAO-01-914, at 14 (Aug. 2001) (Table 1: Characteristics of Cleveland Families with Students in the Voucher Program or Public Schools and Table 4: Racial and Ethnic Composition of Cleveland Public School Voucher School Students, School Year 1998-99). The Sixth Circuit reported that 60% of these families were at or below the poverty level. *Simmons-Harris v. Zelman*, 234 F.3d 945, 949 (2000).

The GAO Report also noted that approximately 3400 voucher students were enrolled in fifty-two private schools. These schools received approximately \$5.2 million in publicly funded payments for the 1999-2000 academic year. In contrast, the cost for educating the remaining 76,000 students in Cleveland's 121 public schools was \$712 million or about \$9368 per student.

6. Molly Townes O'Brien, *Private School Tuition Vouchers and the Realities of Racial Politics*, 64 TENN. L. REV. 359, 392 (1997).

7. 536 U.S. 639 (2002).

survive an Establishment Clause challenge.⁸

The central historical experience of African-Americans in the United States up to the Supreme Court's opinion in *Brown v. Board of Education* was that of a group of variegated peoples united by race and compelled to live constantly and consistently under unfavorable material, psychological, and spiritual conditions. Racial subordination was an oppressive force that met African-Americans in every aspect of life. It met them in the fields, at the factory or the office when they were assigned a job, when they applied for a job, when they had a job and when they lost a job. It met them in the marketplaces when they sought to purchase goods or services from others or sell goods and services to others. It met them in the neighborhoods where they lived and in the schools their children attend. It met them at the doctors office, at the hospital, and at the funeral home. It filled the air that they breathed from the cradle to the grave. This historical experience of oppression created a cultural perspective for coordinated action that viewed the primary purpose, goal, and objective of collective action as the liberation of black people from racial domination. Thus, the perception of the social world was conceptualized as populated primarily by involuntary racial and ethnic groups. The black individual was not viewed as discrete, distinct, autonomous nor living a separate isolated existence, but as a member of an organic connected community. This connection was involuntary and could not be severed by the choices of individual blacks. The result was that every black person regardless of their religious creed, social or economic status, level of education, gender, the region of the country from which they hailed, sexual orientation or associational or political affiliations were under a never-ceasing obligation to fight for the liberation of African-American people.

The original proposals for public funding of private school choice were from southerners who desired to maintain the oppressive grip of segregation on the black community. From the perspective of the African-American community, support for desegregation of public education and concomitant opposition to the use of public funds to provide private education was easily justified. Desegregation of public schools was an important aspect in the effort of black people to dismantle the oppressive structures of segregation and foster the integration of the entire American society. School vouchers were associated with the most virulent form of racism against the black community. Though integrating public schools required tremendous sacrifice by black parents, school children and teachers, that sacrifice was in the long term interest of the black community.

Almost fifty years after the Supreme Court's opinion in *Brown v. Board of Education*, the social conditions of the black community regarding the education of black school children have changed drastically. The termination of school desegregation decrees and the striking down of voluntary integration plans mean

8. See, e.g., Charles Fried, *Five to Four: Reflections on the School Voucher Case*, 116 HARV. L. REV. 1 (2002); Kathleen M. Sullivan, *The New Religion and the Constitution*, 116 HARV. L. REV. 1397, 1398-89 (2003); John Gehring, *Voucher Battles Head to State Capitals*, EDUC. WK., July 10, 2002, available at <http://www.edweek.org>.

that America's public schools are becoming increasingly resegregated. In addition, the condition of the black public school teacher has changed significantly. Prior to desegregation half of the black professionals were public school teachers. Concern about their interest was vitally important to the African-American community. But with the opening of so many opportunities outside of public education for talented African-Americans, public school teachers have lost some of the importance and status they formerly held in the black community. For example, in 1995-96 only 7.8% of bachelor's degrees awarded to African-Americans were in the field of education.⁹ There were almost three times as many African-Americans who received bachelor's degrees in business and management than education.¹⁰ In addition, losses of black teachers during desegregation coupled with reduction in the percentage of black teachers compared to black students as a result of educational reform movements in the past twenty years, have reduced the ranks of black teachers. Only 7.3% of public school teachers are black¹¹ despite the fact that black children constitute 17.2% of public school students.¹² In fact, while only 60.3% of public school students are white non-Hispanic,¹³ they constitute 90.7% of public school teachers.¹⁴ Finally, African-American students continue to lag behind other racial/ethnic groups in almost all educational achievement criteria in public education. It is not clear that public education effectively serves the interest of black school children.

The basic assertion of this Article is that since the first time the issue of public funding of private education occurred, many changes affecting the educational situation of black school children have transpired. Today there is much less reason to object to public funding of private education in terms of the continuing struggle of the black community for its liberation. The result is that from the perspective of the black community's struggle against racial oppression, school vouchers are better viewed in terms of the educational interest of the affected individual black school children and their parents at a particular place that is considering the issue at the time the issue is being discussed, not in terms of the liberation of the black community. In many such circumstances, school vouchers could increase the educational choices that individual parents have available and thereby increase the chances of finding the best educational placement for their school children.

Part I briefly distinguishes school vouchers from other forms of choice in public schools. In particular, it distinguishes school vouchers from another

9. Nat'l Ctr. for Educ. Statistics, Digest of Education Statistics 337, table 266 (1998).

10. *Id.*

11. See U.S. Dep't of Commerce, Bureau of the Census, *Percentage Distribution of Public School Students Enrolled in Kindergarten to Grade 12, 1972-2000*, at http://nces.ed.gov/programs/coe/2002/images/tables/t03_1.gif [hereinafter *Percentage Distribution, 1972-2000*].

12. Beth Aronstamm Young, *Public School Student, Staff, and Graduate Counts by State School Year 2001-2002*, at <http://nces.ed.gov/pubs2003/snf-report03#2>.

13. *Id.*

14. See *Percentage Distribution, 1972-2000*, *supra* note 11.

popular method of fostering school choice, charter schools. Charter schools are a viable alternative to school vouchers for responding to the educational needs of black school children. Since they are still public schools, however, there are constitutional limitations that will affect their educational programs that would not apply to private education.

Part II recounts the initial introduction of public funding of private education in the 1950s and 1960s. School vouchers were first proposed by southern segregationists who sought to avoid their obligation to desegregate their public schools. Thus, objection to public funding of private education and maintenance of the public school system was initially associated with efforts to dismantle segregation and overcome the oppression of the black community.

Part III focuses on the desegregation of public schools. Supreme Court opinions, particularly in the case of *Green v. New Kent County School Board*¹⁵ and *Swann v. Charlotte-Mecklenburg*,¹⁶ fostered a significant increase in the amount of school desegregation from 1968 to 1972. But this trend of Supreme Court cases fostering integration came to an abrupt halt with Supreme Court opinions in *Keyes v. School District No. 1*¹⁷ in 1973, *Milliken v. Bradley*¹⁸ in 1974, and *Pasadena v. Spangler*¹⁹ two years later. These three opinions helped to constrain the amount of school desegregation that would occur during the 1970s and 1980s. Thus, even at the pinnacle of the integration of public schools 62% of black school children attended majority-minority schools and 32.5% were in schools that were at least 90% minority.²⁰

Part IV focuses on the sacrifice of black parents, students, and teachers in the desegregation of America's public schools. The African-American community has always struggled against oppression. From the perspective of the black community, this struggle is a collective one which often requires the sacrifice of the interest of individual blacks for the betterment of the community. During the desegregation era, black school children and black educators were part of the foot soldiers who paid the cost for the desegregation of public schools. What justified their sacrifice was the belief that the end of segregation would be a tremendous benefit to the black community. Objections to public funding of private

15. 391 U.S. 430 (1968).

16. 402 U.S. 1 (1971).

17. 413 U.S. 189 (1973).

18. 418 U.S. 717 (1974).

19. 427 U.S. 424 (1976).

20. GARY ORFIELD & JOHN T. YUN, A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? (Jan. 2003). In the 1980-81 school year, 62.9% of black kids attended majority-minority schools. This figure rose slightly to 63.3% in the 1986-87 school year. In the 1980-81 school year, 33.2% of black school children attended schools that were at least 90% minority. This figure decreased slightly to 32.5% in the 1986-87 school year. For Latinos, however, segregation has been increasing since the 1968-69 school year. At that time, 54.8% were in majority-minority schools and only 23.1% were in schools that were at least 90% minority. Their segregation in the schools has consistently increased over the past thirty-three years, each year finding them increasingly more segregated. See *id.* App. C at 77.

education was part of this struggle. Even if school vouchers could help the educational interest of individual black school children and their parents, vouchers worked against the interest of the black community's struggle against racial subordination by attenuating school integration.

Part V focuses on the developments in education that have affected the attractiveness of public funding of private education from the perspective of the black community. During much of the 1960s and 1970s, America continued to pursue the integration of public schools. But as America began to move into the 1990s, the commitment to integrated education had begun to wane. The tide has turned and America's public schools are in the process of resegregation. In addition to the resegregation of public school children, the condition of the African-American educators has also changed. During the first two decades after the Court's decision in *Brown*, large numbers of them were fired or demoted. The educational reform movements that began to sweep the country in the 1980s have also disproportionately affected black public school educators. Finally, any examination of the issue of school vouchers from the perspective of the educational interest of black school children must focus on the current educational condition of black children in public schools. While significant opportunities have opened up in American society for African-Americans who are educated, a disproportionately large percentage of blacks continue to struggle in elementary and secondary public education.

I. DISTINGUISHING SCHOOL VOUCHERS FROM OTHER FORMS OF SCHOOL CHOICE

Currently, school vouchers are a relatively minor aspect of school choice. There were three publicly-funded voucher programs in operation in Cleveland, Ohio; Milwaukee, Wisconsin; and the State of Florida at the time of the Court's opinion in *Zelman*.²¹ In both Cleveland and Milwaukee, the private school vouchers can be used only within the city limits. The Cleveland program provides for the use of the vouchers in consenting suburban public schools, but as of the Supreme Court's opinion in *Zelman*, no suburban school had volunteered to accept vouchers.²² In Florida, vouchers are given to students in persistently failing schools and may be used at any public or private school, provided that space is available.²³ Transportation is provided, however, only if students choose a public school within their home districts. Only Colorado, whose plan was initiated in April 2003 and is being challenged in the courts, has

21. Dan D. Goldhaber & Eric R. Eide, *What Do We Know (and Need to Know) about the Impact of School Choice Reforms on Disadvantaged Students?*, 72 HARV. EDUC. REV. 157, 158 (2002).

22. James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2047 (2002).

23. To this point the program is small because only two schools have "qualified" as persistently failing. There are only fifty-two students currently receiving vouchers. *Id.*

adopted a voucher program since the Court's decision a year ago.²⁴

Publicly funding private educational choice is only one aspect of choice in American education. The primary method of school choice is through residential housing.²⁵ Normally, parents can choose the public school they wish their child to attend by moving into that school's residential district. Beyond residential choices, the concept of school choice is a varied one. It could broadly be defined as educational policies and practices that allow a student to attend a school other than his or her neighborhood school. With this broad definition, there are a number of methods to increase choice within the public school system. There are a few public school districts that participate in interdistrict school choice programs. These tend to be expensive because transportation generally must be provided. The sending district, which is usually an urban district, may have to reimburse the receiving district for students that transfer.²⁶

Most public school choice plans are intradistrict, meaning students can choose schools within a particular school district but cannot cross district lines to attend schools in another school district.²⁷ Intradistrict public choice often began as part of the remedy for actions by school officials that led to a segregated school system. The passage of the Civil Rights Act of 1964 (the "Act") had an important impact on school desegregation. One provision of the Act banned discrimination in all federally-aided programs. The secretary of Health, Education, and Welfare (HEW) was empowered to deny federal funds to any school district found in violation of this provision. When the Act was passed, however, federal aid to public education was insignificant. At the time, education and its funding were considered primarily an obligation of state and local government. The following year Congress passed the Elementary and Secondary Education Act of 1965. This Act provided funds for schools with a disproportionate number of economically disadvantaged children for remedial assistance in reading and math. Due to the poverty that existed in the deep south, a large portion of these funds were ear marked for the very states that had resisted school desegregation the most. In order to be eligible to receive these funds, however, school systems had to comply with guidelines for what constituted a non-discriminatory school system established by HEW. The existence of this pot of money provided an additional incentive for school systems to desegregate. The HEW guidelines allowed school systems to be considered non-discriminatory if they instituted certain freedom of choice plans. Even though the Supreme Court ruled in *Green v. New Kent County*²⁸ that such

24. Associated Press, *Growth of Vouchers Slow Year After Court Decision* (June 28, 2003), available at <http://www.cnn.com/2003/education/06/28/school.vouchers.ap/index.html>.

25. For a good discussion of residential school choice, see Jeffrey R. Henig & Stephen D. Sugarman, *The Nature and Extent of School Choice*, in *SCHOOL CHOICE AND SOCIAL CONTROVERSY* 13, 14-17 (Stephen D. Sugarman & Frank Kemerer eds., 1999).

26. See Angela Smith, *Public School Choice and Open Enrollment: Implications for Education, Desegregation, and Equity*, 74 NEB. L. REV. 255, 281 (1995).

27. Ryan & Heise, *supra* note 22, at 2046.

28. 391 U.S. 430 (1968).

freedom of choice plans do not satisfy the constitutional obligation to dismantle a dual school system if they do not produce integrated schools, school choice continued to be an important means to advance desegregation.

School choice within a given public school district normally falls into one of three different types. Some school districts allow students to transfer to any other public school of their choice under certain circumstances. In order to aid the desegregation effort, race, and ethnicity of the student seeking to transfer and the racial and ethnic mix of the sending and recipient schools were normally important considerations in addressing these transfer requests. A second type of intradistrict school choice program are magnet schools. Magnet schools were developed primarily to help foster voluntary integration. Magnet programs target specific schools, spend significant amounts of money to upgrade the quality of the physical plant and the curricular offering in such schools, and usually change the academic focus of the school to concentrate on a given subject area. The educational programs of magnet schools are normally centered around foreign languages, reading, science, math or the arts. In order to advance desegregation there are normally racial and ethnic limits used to determine the appropriate mix of the student body. Charter schools are a third type of intradistrict choice option. The concept of charter schools varies across states.²⁹ The number of charter schools has grown to nearly 1700.³⁰

Charter legislation will vary from state to state, but generally, it allows for private persons and institutions to develop and implement plans for a given school. Charter schools differ from magnet schools in that charter schools focus on educational reform rather than integration.³¹ Most charter school legislation correctly defines them as public schools,³² but they are under less supervisory control than traditional public schools and can often operate somewhat independently of the public school authorities. Charter schools are intended to foster new approaches to education with innovative curriculum and instruction. The unique focus of charter schools is the primary means of attracting parents and their school children to the school.

Charter schools do not charge their students tuition, but instead receive per pupil public dollars to fund their educational efforts. They are a viable alternative to school vouchers. Charter schools can provide parents of black school children the opportunity to become more involved with the design of their children's educational program.³³ Since they are still public schools, however, constitutional limits placed on public school authorities will still apply.

29. For a brief basic primer about charter schools, see Wendy Parker, *The Color of Choice: Race and Charter Schools*, 75 TULANE L. REV. 563, 574-77 (2001).

30. See Center for Education Reform 2000, *Charter School Highlights and Statistics*, available at <http://www.edreform.com/pubs/chglance.htm>; see also Goldhaber & Eide, *supra* note 21, at 172.

31. Robin Barnes, *Group Conflict and the Constitution: Race, Sexuality, and Religion: Black America and School Choice: Charting a New Course*, 106 YALE L.J. 2375, 2404 (1997).

32. For a brief basic primer about charter schools, see Parker, *supra* note 29, at 605.

33. See Barnes, *supra* note 31.

Educators will have to respect the students rights to privacy³⁴ and freedom of speech.³⁵ These constitutional limitations will also affect the educational programs of charter schools. Thus, religious instruction will be prohibited.³⁶ In addition, students are typically selected on a first-come, first-served basis and if the school is oversubscribed then a lottery must be conducted to determine the student body.

Restrictions on public officials derived from the Equal Protection Clause will also apply to charter schools. From the perspective of the black community, one potential educational reform movement that was prevented, due in part to the conclusion that it would violate the Equal Protection Clause, was the development of so called "African-American Male Academies." In an effort to respond to the belief that black males had become an endangered species which was evidenced by high homicide rates, high rates of imprisonment, an increase in the rate of suicide, and a decrease in life expectancy, some public school districts brought forth proposals in the late 1980s and early 1990s to establish African-American male classrooms or academies.³⁷ The intention was to separate black male students from other students, provide them with black male teachers and mentors, and use alternative educational techniques and strategies directed at generating academic success. Proposals for such education surfaced in a number of cities, including Baltimore, Detroit, Miami, Milwaukee, and New York,³⁸ but legal and constitutional objections put a quick end to this developing

34. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

35. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

36. See *Edwards v. Aguillard*, 482 U.S. 578, 581, 583, 585, 612 (1987) (striking down a statute requiring teachers to teach creation science whenever they taught the theory of evolution); *Wallace v. Jaffree*, 472 U.S. 38, 55-56 (1985) (striking down an Alabama statute authorizing a one minute period of silence for meditation or prayer); *Stone v. Graham*, 449 U.S. 39, 40-41 (1980) (*per curiam*) (striking down a statute providing for posting of the Ten Commandments, paid for by private funds, on the walls of each public classroom in Kentucky); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (striking down a statute that prohibited the teaching of evolution in public schools in Arkansas).

37. This issue was first brought to the attention of the black community in a special issue of *Ebony* magazine, published in August 1983. Walter Leavy proposed the provocative question: Is the black male an endangered species? Walter Leavy, *Is the Black Male an Endangered Species?*, *EBONY*, Aug. 1983, at 41. There have been debates and discussions about the survivability and viability of the African-American male. See generally *BLACK MEN* (Lawrence E. Gary ed., 1981); *YOUNG, BLACK, AND MALE IN AMERICA: AN ENDANGERED SPECIES* (Jewelle Gibbs et al. eds., 1988); Symposium, *The Impact of the Judicial System on the Status of African-American Males*, 23 *CAP. U. L. REV.* 1 (1994).

38. For an extended discussion of this issue, see Kevin Brown, *The Dilemma of Legal Discourse for Public Educational Responses to the "Crisis" Facing African-American Males*, 23 *CAP. U. L. REV.* 63 (1994).

educational trend.

Miami abandoned its plan to establish experimental separate schools for African-American males after receiving a letter from the Department of Education indicating that it was the Department's position that such schools were illegal.³⁹ Detroit went forward and prepared to open its African-American Male Academies for the start of the 1991-92 school year. However, in *Garrett v. Board of Education*,⁴⁰ a federal district court in August 1991 granted a preliminary injunction against the Detroit School Board's proposal for male academies. The American Civil Liberties Union of Michigan and the National Organization of Women Legal Defense and Education Fund represented the plaintiffs. The plaintiffs challenged the gender-based exclusion of women from the schools.⁴¹ The district court enjoined the implementation of the male academies, concluding that the Detroit plan would violate state law as well as Title IX,⁴² the Equal Educational Opportunities Act,⁴³ and the Fourteenth Amendment.⁴⁴

While the push for African-American Male Academies was contained, many public schools modified their educational curriculum to make it Afrocentric. An Afrocentric curriculum is an emerging educational concept and educators will determine what passes as truly Afrocentric over the course of time. In a vague sense, an Afrocentric curriculum teaches basic courses by using Africa and the sociohistorical experience of Africans and African-Americans as its reference points.⁴⁵ An Afrocentric story places Africans and African Americans at the center of the analysis. It treats them as the subject rather than the object of the discussion.⁴⁶ However, this perspective is not a celebration of black

39. See Letter from Jesse L. High, Regional Civil Rights Director, Office of Civil Rights, U.S. Department of Education, to Dr. Joseph A. Fernandez, Superintendent of Schools, Dade County Public Schools (Aug. 31, 1988) (on file in the University of Iowa College of Law Library); Kevin Brown, *Do African-Americans Need Immersion Schools?: The Paradoxes Created by Legal Conceptualization of Race and Public Education*, 78 IOWA L. REV. 813, 850 n.153 (1993).

40. 775 F. Supp. 1004 (E.D. Mich. 1991).

41. *Id.* at 1005.

42. Title IX of the Education Act, Amendments of 1972, 20 U.S.C. § 1681 (1990).

43. 20 U.S.C. § 1701 (1990).

44. The district court specifically noted it "[was] not presented with the question of whether the Board can provide separate but equal public school institutions for boys and girls." *Garrett*, 775 F. Supp. at 1006. n4.

45. Sonia R. Jarvis, Brown and the Afrocentric Curriculum, 101 YALE L.J. 1285, 1294 (1992).

46. See Robert K. Landers, *Conflict Over Multicultural Education*, in EDITORIAL RESEARCH REPORTS 682, 691 (Cong. Q. Inc. 1990). See generally MOLEFI K. ASANTE, AFROCENTRICITY (1988); MOLEFI K. ASANTE, AFROCENTRICITY: THE THEORY OF SOCIAL CHANGE (1980); MOLEFI K. ASANTE, THE AFROCENTRIC IDEA (1987); C. TSEHLOANE KETO, THE AFRICA CENTERED PERSPECTIVE OF HISTORY AND SOCIAL SCIENCES IN THE TWENTY-FIRST CENTURY (1989). The Afrocentric perspective rests upon the premise that it is valid to posit Africa as the geographical and cultural starting base for peoples of African descent. When the discussion is limited to

pigmentation. An Afrocentric perspective does not glorify everything blacks have done. It evaluates, explains, and analyzes the actions of individuals and groups with a common yardstick, the liberation and enhancement of the lives of Africans and African-Americans.⁴⁷ This Article could be viewed as one written from an Afrocentric perspective.

An Afrocentric curriculum provides black students with an opportunity to study concepts, history, and the world from a perspective that places their cultural group at the center of the discussion. Such a curriculum infuses these materials into the relevant content of various subjects, including language arts, mathematics, science, social studies, art, and music.⁴⁸ Students are provided with both instruction in the relevant subject and a holistic and thematic awareness of the history, culture, and contributions of people of African descent. For example, from an Afrocentric perspective the focal point of civilization is the ancient African civilization that developed in Egypt (known as "Kemet" or "Sais") as opposed to Ancient Greece.⁴⁹ Therefore, Egypt, not Greece is the origin of basic concepts of math and science. This is done to show African-American students

reconstructing the history of African-Americans, however, the Afrocentric perspective becomes an African-American centered perspective.

47. KETO, *supra* note 46, at 31. Afrocentric materials can be written by anyone, regardless of race or ethnicity. Africans and African-Americans, however, having personally experienced the reality of being black, are in a better position than non-African-Americans to express this perspective.

48. Portland, Oregon, for example, began using African-American baseline essays which were first developed in 1982 as part of a multicultural program. Portland has developed similar materials on the history, culture, and contributions of five other geo-cultural groups: Asian-Americans, European-Americans, Hispanic-Americans, Indian-Americans, and Pacific Island-Americans. *Id.* at vi. For example, the mathematics section begins by pointing out that many programs avoid the African basis for mathematics. Egyptian mathematics began in 580 B.C., almost 2000 years before history acknowledges the start of mathematics in Greece. This section also argues that geometry and trigonometry began in ancient Egypt. The Pythagorean Theorem may have been formulated by the ancient Egyptians 1000 years before it was discovered by Pythagoras. Euclid, one of the greatest mathematicians of his era, though pictured as a fair European Greek, was actually an Egyptian. *Id.* at M5.

The Portland essays have been the inspiration for Afrocentric curriculum in Atlanta, Baltimore, Detroit, Indianapolis, Milwaukee, Philadelphia, Pittsburgh, Richmond, Washington, D.C., and other cities. See Steven Siegel, *Ethnocentric Public School Curriculum in a Multicultural Nation: Proposed Standards for Judicial Review*, 40 N.Y.L. SCH. L. REV. 311, 319 (1996).

49. A number of scholars have argued that Egypt was a black African nation whose culture influenced the development of the philosophy, science, math, religion, and culture of the ancient Greeks. See generally YOSEF A. BEN-JOCHANNAN, AFRICA: MOTHER OF "WESTERN CIVILIZATION," (1971); 1 MARTIN BERNAL, BLACK ATHENA: THE AFROASIATIC ROOTS OF CLASSICAL CIVILIZATION (1987); 2 MARTIN BERNAL, THE AFROASIATIC ROOTS OF CLASSICAL CIVILIZATION (1991); CHEIKH A. DIOP, THE AFRICAN ORIGIN OF CIVILIZATION: MYTH OR REALITY (Mercer Cook ed. & trans., 1974); WILLIAM N. HUGGINS, AN INTRODUCTION TO AFRICAN CIVILIZATIONS (1969); GEORGE M. JAMES, STOLEN LEGACY (1954).

that they can maintain their cultural identity and still succeed in their studies.

There are charter schools established with an Afrocentric curriculum.⁵⁰ There have not been any legal challenges to Afrocentric education.⁵¹ Some scholars, however, argue that such education is potentially vulnerable to constitutional challenges. One commentator has already speculated that culturally centric charter schools may, in certain circumstances, be unconstitutional.⁵² Others have raised questions about the legality of teaching public school students certain claims made in some of the Afrocentric materials.⁵³

Charter schools may provide educators with the ability to respond to the educational interest of African-American children. However, since they are also public schools, it may be that the educational flexibility will ultimately be too restricted by constitutional limitations on the structure and content of their educational program. These limitations do not apply to private schools.

II. HISTORY OF VOUCHERS IN THE CONTEXT OF PUBLIC SCHOOL DESEGREGATION

Contemporary discussions of the issue of school vouchers normally start their historical analysis of this issue with Milton Friedman's 1955 essay.⁵⁴ But to understand the arguments against vouchers that focus on their impact for the African-American community, it is necessary to focus on the history of vouchers that predates the economic professor and Nobel Laureate's proposal.

As the 1950s unfolded, it became increasingly clear in southern circles that the Supreme Court might soon move to require integration of public elementary and secondary schools. In September 1950 prominent black Atlanta attorney Austin T. Walden and Thurgood Marshall, Director Counsel of the NAACP Legal Defense and Educational Fund, Inc., filed a claim in federal district court

50. For example, Harvest Preparatory School is a charter school in Minneapolis. It uses an Afrocentric curriculum with an emphasis on basic skills. See John Ramsay, *A Direct Challenge: An Irresistible Question Presented Itself as an Educator Studied an Urban School's Highly Touted, but Controversial, Reading Program: Would It Work for His Preschooler?*, STAR TRIB. (Minneapolis), July 9, 1998.

51. See Brown, *supra* note 39.

52. Parker, *supra* note 29.

53. See Siegel, *supra* note 48, at 319 (noting that some Afrocentric scholars and educators have propounded the theory that blacks are a genetically superior race because the high concentration of melanin in the skin makes possible superior mental cognitive abilities). The author concludes by arguing that there is a legitimate and limited role for the judiciary in addressing claims in ethnocentric curriculum. These would include the constitutional power to strike down the establishment of schoolwide ethnocentric curriculum that promotes segregation.

54. Milton Friedman, *The Role of Government in Education*, in *ECONOMICS AND THE PUBLIC INTEREST* (Robert A. Solo ed., 1955). Long range historians note that Adam Smit seems to have been the first social theorist to propose that the government finance education by giving money to parents to hire teachers. See, e.g., *Education Vouchers: A Report on Financing Elementary Education by Grants to Parents*, from the Center for the Study of Public Policy, at vii (1970).

on behalf of two hundred black school children and their parents in Atlanta. The suit sought either the equalization of educational resources for the black children or the admission of black children to white schools.⁵⁵ In response to the filing of this lawsuit Roy Harris predicted, in the *Augusta Courier*, that if the courts ordered the desegregation of public schools, white Georgians would stop taxing themselves to support public education and eventually place their children in private schools.⁵⁶ Harris argued that if the public school system would mean the destruction of the system of segregation that was so predominant in the South, then the state of Georgia should do away with the public school system. Harris went on to suggest a publicly funded private school plan.⁵⁷

Within months of Harris' article, the Georgia General Assembly considered legislation that would cut off funds and thus close all public schools if black children were allowed to integrate the former all-white schools. The General Assembly had the power to turn state-owned property over to private individuals for educational purposes and indicated a willingness to do so. The General Assembly also set up a program that would provide grants to individuals for educational purposes. These grants could be used at private schools chosen by the recipient.⁵⁸

The actions of the Georgia legislature were followed in November 1952 by South Carolina. Voters there approved a constitutional amendment that eliminated the state's duty to educate all children.⁵⁹ This meant that education could be handled as a private matter. Governors of two other states, Mississippi and Virginia, considered similar proposals.⁶⁰

After the Supreme Court rendered its opinion in *Brown v. Board of Education*,⁶¹ resistance to school desegregation, particularly in the deep South was massive. The Court's opinion in *Brown* struck down segregation statutes in twenty-one states. The states of Arizona, Kansas, New Mexico, and Wyoming only permitted local school districts to adopt racial segregation. These states generally complied with the Supreme Court's decision that state-mandated segregated schools were unconstitutional without much difficulty.⁶² Six other states—Delaware, Kentucky, Maryland, Missouri, Oklahoma, and West Virginia—along with the District of Columbia, also complied with the desegregation decision without much opposition. But the eleven states that had formerly been part of the Confederacy employed various methods to minimally

55. See Thomas V. O'Brien, Aron v. Cook and the NAACP in Georgia Before Brown, 23 J. MIDWEST HIST. EDUC. SOC'Y 129, 129-32 (1996).

56. Roy V. Harris, *Strictly Personal*, AUGUSTA COURIER (Georgia), Oct. 9, 1950, at 1.

57. For a discussion of Roy Harris as the original proponent of publicly funded private education, see O'Brien, *supra* note 6, at 374-85.

58. *Id.* at 385.

59. *Id.*

60. *Id.*

61. 347 U.S. 483 (1954).

62. CIVIL RIGHTS AND AFRICAN-AMERICANS 453 (Albert P. Blaustein & Robert L. Zangrando eds., 1968).

comply or avoid compliance with their constitutional obligation to desegregate their public schools.⁶³

In June 1954, one month after the Supreme Court's decision in *Brown*, eight governors and three representatives sent by the governors of Arkansas, Tennessee, and Texas met in Virginia. They unanimously vowed not to comply voluntarily with the Supreme Court's decision.⁶⁴ On March 12, 1956, a group of southern senators and congressmen presented the Southern Manifesto in which they asserted their intention to use every legal tactic possible to resist desegregation.⁶⁵

Measures passed by the states resisting school desegregation included the denial of state funds to schools attended by pupils of different races; threats to close the public schools in the event they were integrated; delegation of control of the public schools to the governor or the state legislature, in hopes of frustrating federal court orders; abolition of compulsory schooling; criminal penalties for teaching in or attending an integrated school; and firing teachers who advocated desegregation.⁶⁶ Another tactic which assisted in resistance to school desegregation decrees was using public funds to provide private education. A number of southern jurisdictions proposed privatizing education as a way to defeat school desegregation.

Little Rock, Arkansas, was one of the first communities below the Potomac to make preparations for compliance with *Brown*'s requirement to desegregate the schools. Little Rock was considered a moderate southern city without a record of political extremism on racial issues. The city had already desegregated

63. *Id.*

64. See NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950S*, at 77 (Louisiana St. Univ. Press 1969) (citing RICHMOND NEWS LEADER, June 11, 1954).

65. MARY FRANCES BERRY, *BLACK RESISTANCE, WHITE LAW: A HISTORY OF CONSTITUTIONAL RACISM IN AMERICA* 139 (1994).

66. DIANE RATIFICH, *THE TROUBLED CRUSADE: AMERICAN EDUCATION 1945-1980*, at 133 (1983). See also *Griffin v. Sch. Bd. of Prince Edward County*, 337 U.S. 218 (1964) (invalidating a scheme by Prince Edward County where the county closed its public schools and at the same time contributed grants of public funds to white children to attend private schools); *Goss v. Bd. of Educ.*, 373 U.S. 683, 688 (1963) (invalidating a procedure which allowed students to transfer from a school where their race was in the minority to a school where their race was in the majority); *Cooper v. Aaron*, 358 U.S. 1 (1958) (rejecting a request by Little Rock, Arkansas School Board for a two-and-one-half year delay in implementing a court-approved desegregation program; the school board had sought the delay because of "extreme public hostility" towards desegregation engendered by the governor of Arkansas, who dispatched units of the Arkansas National Guard to block the school board's planned desegregation of a local high school).

The history of resistance by southern schools has been chronicled by a number of authors. See, e.g., EARL BLACK, *SOUTHERN GOVERNORS AND CIVIL RIGHTS: RACIAL SEGREGATION AS A CAMPAIGN ISSUE IN THE SECOND RECONSTRUCTION* (1976); C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (3d ed. 1974); Frank T. Read, *Judicial Evolution of the Law of School Integration Since Brown v. Board of Education*, 39 LAW & CONTEMP. PROBS. 7, 13-28 (1975).

the city buses without opposition and it was assumed that school desegregation would proceed without much opposition either.⁶⁷

Three days after the first *Brown* opinion, the Little Rock District School Board adopted a policy statement indicating that it was their responsibility to comply with the Federal Constitution and intended to do so when the Supreme Court of the United States outlines the methods to be followed. On May 24, 1955, the school board approved a gradual desegregation plan, seven days before the Supreme Court's implementation decision in *Brown II*.⁶⁸ Desegregation would start in September 1957 at the high school level and involve grades ten to twelve. A total of nine blacks were assigned to the all-white Central High School which had over 2000 students. The school board also announced that it would proceed to the junior high and elementary level with complete desegregation of the school system accomplished by 1963.

Governor Orval Faubus, however, ordered units of the Arkansas National Guard to Central High School on September 3, 1957, the day before the start of school, to prevent attendance by the black students.⁶⁹ When the black students attempted to enter Central High School, the Arkansas National Guard forcibly prevented them. Public hostility to the integration of Central High School increased. Mobs of angry whites began gathering at Central High to meet the black students as they came to the school. The black students were not able to enter Central High School until President Eisenhower ordered federal troops to Little Rock.⁷⁰ While Eisenhower was able to withdraw the federal troops on November 27, federalized National Guardsmen remained in Central High School throughout the remainder of the school year.

Due to the hostility generated by the Governor's resistance to school desegregation, the Little Rock School Board went back to the federal district court in February 1958 and requested a two and half year delay in its duty to desegregate. The school board argued that the effect of the governor's actions was to harden the core of opposition to the desegregation plan and to cause many persons who reluctantly accepted the plan to believe that there was some power in the State of Arkansas which could be exerted to nullify federal law. Shortly before the start of the school year in September 1958, the Supreme Court in *Cooper v. Aaron*⁷¹ rejected the requested delay stating that preventing race conflicts, as desirable as it may be and as important as it is in the preservation of the peace, can not be accomplished by means which deny rights created or protected under the Constitution.

The Supreme Court's decision in *Cooper v. Aaron* did not end the controversy in Little Rock. On the same day of the Court's decision, Governor Faubus signed into law two measures that had been passed earlier by the

67. See Judith A. Hagley, *Massive Resistance—The Rhetoric and the Reality*, 27 N.M. L. REV. 167, 190–93 (1997).

68. 349 U.S. 294 (1955).

69. See *Cooper*, 358 U.S. at 9.

70. See Exec. Order No. 10,730, 22 Fed. Reg. 7628 (Sept. 24, 1957).

71. 358 U.S. 1 (1958).

Arkansas General Assembly.⁷² These measures allowed him to close the schools in Little Rock. In addition, the Governor was also empowered to withhold state educational funds and money from the County General School Fund from any school district in which he ordered the schools closed. The monies withheld could then be made available, on a per capita basis, to any other public school or any non-profit private school accredited by the state board of education (of which the governor was a member), which should be attended by students of a closed school.⁷³

Pursuant to these new statutes, the Governor ordered the schools closed in Little Rock. The schools remained closed during the entire 1958-1959 school year. During that school year, approximately \$500,000 was withheld from the Little Rock school district. A significant portion of the funds were used to pay for white students that enrolled in a private school, Raney High School.⁷⁴

Virginia was another state that attempted to use public funding for private education as a means to avoid the duty to desegregate its schools. The Virginia Constitution was amended in 1956 to authorize the General Assembly and local governing bodies to appropriate funds to assist students who would rather go to nonsectarian private schools than public schools.⁷⁵ The General Assembly also met in special session and enacted legislation to close any public schools where white and colored children were enrolled together, to cut off state funds to such schools, to pay tuition grants to children in nonsectarian private schools and to extend state retirement benefits to teachers in newly created private schools.⁷⁶

72. *Aaron v. McKinley*, 173 F. Supp. 944, 947 (D.C. Ark. 1959). For a discussion of several statutes the Arkansas legislature adopted to maintain school segregation, see Raymond T. Diamond, *Confrontation as Rejoinder to the Compromise: Reflections of the Little Rock Desegregation Crisis*, 11 NAT'L BLACK L.J. 151, 155 (1989).

73. See *Aaron*, 173 F. Supp. at 947.

74. According to the district court,

\$350,586 in funds allocable to the Little Rock School District had been withheld up to May 4, 1959. The total amount which will be withheld by the end of the 1958-59 school year, if these Acts remain in effect, will be slightly in excess of \$510,000. Of the funds withheld, \$187,768 has been paid to other schools, public and private. Of this amount, \$71,907.50 was paid to the private Raney High School.

Id. at 952.

After the Arkansas Supreme Court upheld the statutes upon which Faubus acted in *Garrett v. Faubus*, 323 S.W.2d 877, 884 (Ark. 1959), his actions were challenged in federal district court by a class action brought by school age black children and their parents and guardians. In June of 1959 the federal district court declared the state statutes which Governor Faubus relied upon unconstitutional. The Supreme Court affirmed the decision per curiam without a hearing. *Aaron*, 173 F. Supp. at 944, *aff'd sub nom. Faubus v. Aaron*, 361 U.S. 197 (1959).

75. Virginia tuition grants originated in 1930 as aid to children who had lost their fathers in World War I. The program was expanded until the Supreme Court of Appeals of Virginia held that giving grants to children attending private schools violated the Virginia Constitution. *Almond v. Day*, 89 S.E.2d 851 (Va. 1955). It was then that Section 141 was amended.

76. See *Griffin v. County Sch. Bd.*, 377 U.S. 218, 221-22 (1964).

Governor Almond of Virginia closed schools in three counties to prevent them from being integrated. The Virginia Supreme Court, however, ruled in 1959 that the legislation closing racially mixed schools and cutting off funds to such schools violated Virginia's Constitution.⁷⁷

One of the companion cases to *Brown v. Board of Education* came from Prince Edward County, Virginia.⁷⁸ In the implementation decision a year later, Prince Edwards County was placed under a duty to convert to a "racially non-discriminatory school system with all deliberate speed."⁷⁹ As early as 1956, however, the Supervisors of Prince Edward County concluded that they would not operate public schools where black and white children were taught together. In June 1959, the United States Court of Appeals for the Fourth Circuit directed the federal district court (1) to enjoin discriminatory practices in Prince Edward County schools, (2) to require the county school board to take immediate steps toward admitting students without regard to race to the white high school in the school term beginning September 1959, and (3) to require the board to make plans for admissions to elementary schools without regard to race.⁸⁰ The supervisors, however, refused to levy school taxes for the 1959-60 school year. As a result the schools of the county did not open in the fall of 1959. They were to remain closed until the Supreme Court addressed this situation with its 1964 opinion in *Griffin v. County School Board*.⁸¹

In order to provide education for the white children, the Prince Edward School Foundation was formed. The Foundation built its own school and started operation when the public schools were closed. While an offer was made to set up private schools for the black school children, this was rejected by the African-American community which preferred litigation. Thus, the black school children were without any formal education from 1959 to 1963 until federal, state, and county authorities cooperated to have classes for blacks and whites in school buildings owned by the county.

During the 1959-60 academic school year the Foundation's schools, set up for the white children, were completely supported by private funds, without any public contributions. In 1960 the General Assembly, however, adopted a new tuition grant program. Every child in the state regardless of race was eligible for tuition assistance of \$125 or \$150 to attend a nonsectarian private school or a public school outside his locality. The legislation also authorized localities to provide their own education grants to students attending private schools or public schools outside the district. After this legislation was passed, the Prince Edward County Board of Supervisors adopted an ordinance providing tuition grants of \$100. Thus, each child in Prince Edward County attending the Foundation's

77. See *Harrison v. Day*, 106 S.E.2d 636 (Va. 1959).

78. This case was actually argued in front of the Supreme Court by Governor Almond when he was attorney general for the State of Virginia.

79. 349 U.S. 294, 301 (1955).

80. *Allen v. Sch. Bd. of Prince Edward County*, 266 F.2d 507, 511 (4th Cir. 1959).

81. 377 U.S. 218, 222-23 (1964). The other public schools in every other county in Virginia remained open.

schools received a total of \$225 if in elementary school or \$250 if in high school. These grants constituted the major source of funding for the Foundation schools in the 1960-1961 academic school year. The Prince Edward County Board of Supervisors also passed an ordinance allowing property tax credits up to 25% for contributions to any nonprofit, nonsectarian private school in the county.

In 1961 the black petitioners filed a supplemental complaint with the district court adding new parties and seeking to enjoin the refusal by county officials to operate the public schools and to enjoin payment of public funds that helped to support private schools which excluded students on account of race. The district court concluded that "the end result of every action taken by that body [Board of Supervisors] was designed to preserve separation of the races in the schools of Prince Edward County, and enjoined the county from paying tuition grants or giving tax credits so long as public schools remained closed."⁸² The district court, however, did not address the issue of whether the public schools of the county could be closed. Rather the district court abstained on this issue pending determination by the Virginia courts of whether the constitution and laws of Virginia required the public schools of be kept open. Eleven months later, however, the district court issued a ruling without waiting for the Virginia courts to decide the question in which it held that "the public schools of Prince Edward County may not be closed to avoid the effect of the law of the land as interpreted by the Supreme Court, while the Commonwealth of Virginia permits other public schools to remain open at the expense of the taxpayers."⁸³

Not long after the district court's ruling, the Prince Edward County Board of Supervisors and the School Board filed for a declaratory judgment in a Virginia circuit court. Having filed for the declaratory judgment, the County Board of Supervisors and the County School Board asked the federal district court to abstain from further proceedings until the state court suit was resolved. The district court declined. The Fourth Circuit reversed, with Judge Bell dissenting. The Fourth Circuit concluded that the district court should have waited for the state court to rule on the validity of the tuition grants, the tax credits and the validity of the closing of the public schools.⁸⁴

By the time the United States Supreme Court rendered its opinion the Supreme Court of Appeals of Virginia had ruled in the case.⁸⁵ The Virginia high court upheld the state law used to close the Prince Edward County public schools, the state and county tuition grants for children who attend private schools, and the county's tax concessions for those who make contributions to private schools.⁸⁶ The Supreme Court of Appeals of Virginia concluded that each county had the option to operate or not to operate public schools.

The United States Supreme Court concluded that it could not be clearer that Prince Edward County public schools were closed and private schools operated

82. *Allen v. Sch. Bd. of Prince Edward County*, 198 F. Supp. 497, 503 (D.C.E.D. Va. 1961).

83. *Allen v. Sch. Bd. of Prince Edward County*, 207 F. Supp. 349, 355 (D.C.E.D. Va. 1962).

84. *Griffin v. Bd. of Supervisors of Prince Edward County*, 322 F.2d 332 (4th Cir. 1963).

85. *Sch. Bd. of Prince Edward County v. Griffin*, 133 S.E.2d 565 (Va. 1963).

86. *Griffin*, 377 U.S. at 229-30.

in their place with state and county assistance, for one reason—to ensure that white and colored children in Prince Edward County would not go to the same school. The Supreme Court went on to state that “whatever nonracial grounds might support a State’s allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional.”⁸⁷

The State of Louisiana provides another example. May 25, 1960, the federal district court in Louisiana entered an order restraining and enjoining the St. Helena Parish School Board and its superintendent from continuing the practice of racial segregation in the public schools under their supervision. The district court order went on to require the School Board to make necessary arrangements for the admission of children to such schools on a racially non-discriminatory basis with all deliberate speed. The Fifth Circuit affirmed this judgment on February 9, 1961.⁸⁸ The Fifth Circuit also delivered opinions affirming desegregation rulings of the Baton Rouge public schools and five state trade schools in February 1961.⁸⁹

On the same day the Fifth Circuit affirmed the district court order regarding St. Helena Parish schools, the Governor of Louisiana called an Extraordinary Session of the Louisiana Legislature to act regarding the education of the school children of the State. He proposed emergency legislation designed to continue racial segregation in the public schools despite the orders of the federal courts. The legislation allowed public schools under desegregation orders to be changed to private schools. These schools would be operated in the same way, in the same buildings, with the same furnishings, with the same money, and under the same supervision as they were when they were public schools. The legislation also required that school boards of the parish where the public schools had been closed to furnish free lunches, transportation, and grants-in-aid to the children attending the private schools. This legislation was struck down by the federal district court.⁹⁰

As this brief history is intended to show, the first major appearance of the concept of public funding of private education was in the context of thwarting efforts to integrate public schools. Thus, with regard to the experience of the African-American community, the first appearance of publicly-funded private school education was not linked to an effort to improve the educational situation of school children as suggested by Milton Friedman. Rather, it was linked to the worst aspects of racism and efforts to maintain the oppression of the black community. Support for school vouchers was thus tantamount to perpetuation of racial oppression of the black community.

87. *Id.* at 231 (citing *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955)).

88. *St. Helena Parish Sch. Bd. v. Hall*, 287 F.2d 376 (5th Cir. 1961).

89. *See Hall v. St. Helena Parish Sch. Bd.*, 197 F. Supp. 649, 651 (D.C. La. 1961).

90. *Helena Parish Sch. Bd. v. Hall*, 368 U.S. 515 (1962); *Hall*, 197 F. Supp. at 651.

III. DESEGREGATION OF PUBLIC EDUCATION

The first ten years after the Supreme Court's decision in *Brown I* were marked by massive resistance to the obligation of public schools to desegregate. Part of that resistance included efforts to provide private education at public expense. Resistance had been so effective that by 1964, only 2.14% of the black students in the eleven states in the deep South attended desegregated schools.⁹¹

In the 1968 opinion in *Green v. New Kent County School Board*,⁹² the Supreme Court articulated the position that the duty placed on school boards by *Brown I* and *II* required compulsory integration. The Court announced that school boards which had operated a dual school system had an affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated, root and branch, and to do it now.⁹³ The Court rejected freedom of choice school attendance plans that failed to produce integrated schools. The duty imposed on school boards was to obtain racial balance in every facet of school operations including existing policies and practices with regard to students, faculty, staff, transportation, extra-curricular activities and facilities.

Three years after the decision in *Green v. New Kent County School Board*, the Supreme Court faced the question of what was the appropriate limit on the duty to desegregate a school system. In their opinion in *Swann v. Charlotte-Mecklenburg Board of Education*⁹⁴ the Court rejected a limit on desegregation to simply redrawing neighborhood school attendance zones and placed the obligation on school boards to achieve the maximum amount of desegregation possible. As a means in which to pursue this obligation, the Supreme Court also approved the busing of school children beyond the nearest school to their residence.

The impact of these decisions was dramatic and immediate. After *Green*, school desegregation decrees typically required that school systems take account of race and ethnicity of students, teachers and administrators in order to produce integrated public education. In 1967, only 13.9% of blacks students attended majority white schools; but by 1972 that figure had jumped to 36.4%.⁹⁵ While 64.3% of black students attended schools that were at least 90% minority in 1968-69 school year, that percentage dropped to 38.7% in the 1972-73 school year.⁹⁶

In segregationist states, which were primarily the border states and the states

91. See U.S. COMMISSION ON CIVIL RIGHTS, TWENTY YEARS AFTER BROWN: EQUALITY OF EDUCATIONAL OPPORTUNITY 46 (1975).

92. 391 U.S. 430 (1968).

93. *Id.* at 437-38.

94. 402 U.S. 1, 13 (1971).

95. GARY ORFIELD & JOHN T. YUN, THE CIVIL RIGHTS PROJECT, RESEGREGATION IN AMERICAN SCHOOLS 13 (1999), available at <http://www.law.harvard.edu/civilrights/publications/resegregation99.html>.

96. *Id.* at 14.

of the old Confederacy, prior to 1954 school segregation was accomplished pursuant to state statutes. In the 1973 case of *Keyes v. School District No. 1*,⁹⁷ the Court for the first time addressed a desegregation case that came from a state that did not segregate students pursuant to state statute in 1954. *Keyes* required the court to specify when segregation in the public schools violated the Constitution. The Supreme Court noted that what is or is not an unconstitutionally segregated school will necessarily depend upon the facts of each particular case.⁹⁸ The Court concluded that whether the racial and ethnic separation in the public schools of these jurisdictions violated the constitution depended upon the cause of the separation. *De jure*, and not *de facto* segregation violated the Constitution. Unlike *de facto* segregation which could be established by showing racial concentration of students in the public schools, *de jure* segregation was defined as a "current condition of segregation resulting from intentional state action directed specifically to [segregate schools]."⁹⁹ While the *Keyes* Court rejected *de facto* segregation as the basis of the constitutional harm, it also adopted a procedural rule that made proving *de jure* segregation easier. If plaintiffs establish intentional segregation in a significant portion of the school system, then unlawful segregation is presumed to exist throughout the school system.¹⁰⁰ This presumption removed the enormous burden that could have been placed on plaintiffs of establishing unlawful segregation for each school in the system in order to justify a system-wide remedy.

Keyes meant that in the states that were in the north and the west, it was necessary to demonstrate that the segregation was the result of intentional governmental conduct. But, if this could be established in a significant portion of the school district the entire school district was tainted and the desegregation remedy would be district wide. Since *Keyes* rejected *de facto* segregation it could be viewed as the case where the Supreme Court's trend at increasing desegregation in the schools was halted. Regardless of how one views *Keyes*, the next year the Supreme Court rendered its opinion in the Detroit school segregation case of *Milliken v. Bradley*.¹⁰¹

In *Milliken*, the Court addressed an interdistrict school desegregation plan for the first time. After concluding that the Detroit public schools were unconstitutionally segregated, the district court imposed an inter-district desegregation plan that included the City of Detroit and fifty-three of its surrounding suburban school districts. The district court felt that there were not enough white students in the Detroit public schools to successfully integrate the student body. White students comprised 36.2% of Detroit's 1970 public school enrollment.¹⁰² In order for meaningful integration to occur, it was necessary to

97. 413 U.S. 189 (1973).

98. *Id.* at 196.

99. *Id.* at 205-06.

100. *Id.* at 208-09.

101. 418 U.S. 717 (1974).

102. *Bradley v. Milliken*, 338 F. Supp. 582, 585-86 (E.D. Mich. 1971), *aff'd in part and vacated in part*, 484 F.3d 215 (6th Cir.), *rev'd*, 418 U.S. 717 (1974).

include the predominantly white suburban school systems in the desegregation decree. The district court felt justified in including the suburban school systems, because it viewed local school districts as creations of the state of Michigan. Since the district court found that agencies of the state were also responsible for the segregated schools in Detroit, it seemed logical to include these state created school districts in the remedial plan to cure the constitutional violation that infected the Detroit public school system. The Supreme Court, however, rejected the inclusion of the suburban schools in the desegregation remedy. The Supreme Court concluded that absent a showing that a constitutional violation within one school district produced a significant segregating effect in another, there was no justification for cross district remedies.

The *Milliken* decision was a full retreat from the efforts to integrate public schools. By providing an incentive for any parent who wanted to avoid a school desegregation decree to simply move to a suburban school district, the decision encouraged white flight. Since the overwhelming majority of suburban school districts were of relatively recent origins, few of these school systems would be included in desegregation orders. Thus, the general rule was that a desegregation remedy would stop at the boundary of the offending school district.

The consequences of the Supreme Court's decision in *Milliken* was that many urban school districts with high concentrations of minority students were never desegregated. Subsequent Supreme Court decisions, such as the Court's decision in *Pasadena v. Spangler*¹⁰³ two years later, further limited the potential for America to desegregate our public schools. Even though at one point over 500 school districts were operating under school desegregation decrees,¹⁰⁴ at the height of school desegregation 62.9% of black students still attended majority-minority schools and 32.5% were in schools that were at least 90% minority.¹⁰⁵

103. 427 U.S. 424 (1976) (holding that once a school district has implemented a racially-neutral attendance pattern for students, a district court cannot require continued adjustments in order to maintain a certain amount of desegregation). The subsequent resegregation of students is not part of the original constitutional violation if it is primarily the result of choices of individuals to relocate. As a result the district court does not have the authority to remedy it. *Id.*

104. James S. Liebman, *Desegregating Politics: All-out School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1465-66 (1990).

105. ERICA FRANKENBERG ET AL., A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? THE CIVIL RIGHTS PROJECT (Harvard Univ.) (Jan. 2003). In the 1980-81 school year, 62.9% of black kids attended majority-minority schools. This figure rose slightly to 63.3% in 1986-87 school year. In 1980-81 school year 33.2% of black school children attended schools that were at least 90% minority. This figure decreased slightly to 32.5% in 1986-87 school year. For Latinos, however, segregation has been increasing since 1968-69 school year. At that time 54.8% were in majority-minority schools and only 23.1% were in schools that were at least 90% minority. There segregation in the schools has consistently increased over the past 33 years which each year finding them increasingly more segregated. *See id.* App. C, at 77.

IV. THE SACRIFICE OF DESEGREGATION BY THE AFRICAN-AMERICAN COMMUNITY

The Africans that made it to the shores of the United States were people from various tribal groups including Adanse, Akwamu, Akyem, Asante, Bambara, Bantu, Bono, Dagomba, Denkyira, Efik, Ewe, Fante, Fons, Fulani, Ga, Gonja, Hausa, Ibo, Mandingo, Susu, Twifo, Yorba, Wasa, and Wolof. They were from a hundred different ethnic groups and thousands of different villages. In the United States they were brought together by the common trait of their race and compelled to live constantly and consistently under unfavorable material, psychological, and spiritual conditions. Up until the Supreme Court's opinion in *Brown I* the central historical fact of the experience of blacks in America is the reality of a group of people who constantly dealt with the force of racial subordination. Not only did racial subordination meet them in the schools that their children attended, but it met them in every aspect of life. It met them in the fields, at the factory or in the office, when they applied for a job, when they had a job, and when they lost a job. It met them in the marketplaces where they bought goods or services from others or sold goods and services to others. It met them at the doctors office, at the hospital, and at the funeral home. It met them from the cradle to the grave.

In response to living with this reality, African-Americans developed ways of fighting back against racial subordination when they were in positions to do so. This was especially true during the desegregation era. Every black person could be called upon to assist in the struggle to liberate African-American people from oppression. Both African-American school children and black educators paid a very high price for the integration of public schools. Part of what justified their sacrifice was the benefit to be derived by the black community through the end of segregation.¹⁰⁶

A. Children in the Struggle Against Segregation

The brief history about the introduction of school vouchers points to a reality of the desegregation of America—black students and children were expected to sacrifice as part of the struggle. The brave struggles and sacrifices by the black children who integrated Little Rock's Central High School were repeated all over the country.¹⁰⁷ In Prince Edward's County black school children went without education for four years in an effort to compel the integration of the public schools in the county.¹⁰⁸ Black children were also called upon in the wider struggle against segregation. In February 1960 four students from the African-American college of North Carolina A & T demanded to be served at a whites-only lunch counter in Greensboro, North Carolina. These sit-ins helped to fuel protest against segregation throughout the country. The sit-in movement soon

106. GARY ORFIELD ET AL., *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* 103 (1996).

107. See *supra* notes 67-74 and accompanying text.

108. See *supra* note 81 and accompanying text

spread to targeting segregation of facilities such as theaters, churches, swimming pools, retail stores, and drive-in movies.

Reverend Martin Luther King, Jr. called upon the children of Birmingham to desegregate that city in the spring of 1963. They were arrested and jailed by public safety director, Bull Connors. Connors also had water from fire hoses turned on them as well as police attack dogs released on them. During this struggle a bomb went off at the Sixteenth Street Baptist Church killing four little girls.

The best evidence of the sacrifice of the educational interest of black children in order to foster the desegregation of American society was the early realization that desegregation might not substantially increase the academic performance of black school children. As indicated above, the Supreme Court did not actually require mandatory racial mixing as the principle means to remedy the harm of segregation in public elementary and secondary schools until its 1968 decision *Green v. County School Board*.¹⁰⁹ While there was a belief that desegregation could improve academic achievement of black students, prior to *Green*, the results of the "Coleman Report" had cast serious doubt on that belief.

As part of the Civil Rights Act of 1964, Congress commissioned a study, commonly referred to as the "Coleman Report," to determine the "lack of availability of equal educational opportunity" for individuals of different race, color, religion, or national origin.¹¹⁰ In the fall of 1965, a research team led by James Coleman of John Hopkins University and Ernest Campbell of Vanderbilt University surveyed some 4000 public elementary and secondary schools.¹¹¹ The research team not only scrutinized educational facilities, materials, curricula, and laboratories, but also analyzed educational achievement as determined by standardized tests.¹¹²

After noting that tangible equality had been substantially achieved between the public schools for African-Americans and the public schools for Caucasians, the Coleman Report concluded that African-American students in desegregated schools did only slightly better than African-Americans in segregated schools on standardized achievement test.¹¹³ In order to determine the effect of desegregation on student achievement, the Coleman Report compared the achievement levels of four groups of African-American students: (1) those in majority-white classes; (2) those in classes that were half black and half white; (3) those in majority-black classes; and (4) those in all black classes.¹¹⁴ The report stated that African-American students in the first group generally received the highest scores on standardized tests, although the differences from group to group were small.¹¹⁵ Because there was no court-ordered busing when the

109. 391 U.S. 430 (1968).

110. JAMES S. COLEMAN, *EQUALITY OF EDUCATIONAL OPPORTUNITY*, at iii (1966).

111. *Id.* at 1.

112. *Id.* at iii.

113. *Id.*

114. *Id.* at 31-32.

115. *Id.* at 29.

Coleman Report was conducted in 1965, the African-Americans who attended majority-white schools presumably lived in integrated neighborhoods. Their slightly better performance may, therefore, have simply reflected their more privileged socioeconomic position.¹¹⁶ African-American students' achievement did not rise in proportion to the presence of white classmates. Although African-American students in majority-white classes generally had the highest scores, black students in all-black classes actually scored as high or higher than those in half-black or majority-black schools.¹¹⁷ Moreover, in the Midwest, some African-American students in all-black classes outperformed even those African-Americans in majority-white classes.¹¹⁸

Some proponents of desegregation cited the Coleman Report as vindicating desegregation as the appropriate means in which to increase academic achievement by African-Americans. This is because Coleman noted that the academic achievement of children from lower socioeconomic backgrounds, be they white or black, was benefitted by being in schools with children from higher socioeconomic backgrounds (black or white). This statement, when added to the assumption that whites in general are of a higher socioeconomic background than blacks, led to a belief that desegregation would benefit African-Americans academically.

Coleman himself was concerned about the misuse of the report by those arguing for desegregation as a means to increase the academic achievement of African-Americans. In a letter he sent to *The New York Times*, Coleman expressed this concern.

My opinion . . . is that the results [of the Coleman Report] . . . have been used inappropriately by the courts to support the premise that equal protection for black children is not provided unless racial balance is achieved in schools. I believe it is necessary to recognize that equal protection, in the sense of equal educational opportunity, cannot be provided by the State.¹¹⁹

Measures of the benefits of desegregation are normally based on analysis of standardized test scores. During the desegregation era, social scientists tried for years to establish that desegregation alone would lead to significant increases in the educational achievement of African-Americans. Many of these studies, however, have not been able to consistently establish significant educational benefits for African-Americans derived from racial mixing alone.¹²⁰ Even

116. If so, then the academic performance of black students in majority-white classes adds force to one of the major findings of the study, that the socioeconomic status of the student was a strong determinant in academic achievement.

117. *Id.* at 31.

118. *Id.* at 32.

119. JAMES S. COLEMAN, *THE PUBLIC INTEREST* 127-28 (Summer 1972).

120. *Court Ordered School Busing: Hearings on S. 528, S. 1005, S. 1147, S. 1647, S. 1743, and S. 1760 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 150 (1981) (statement of Herbert J. Walberg, Professor of Education,

without demonstrated academic improvement for black students, desegregation was still justifiable to the black community. The desegregation of American society, which created enormous opportunities for African-Americans, was not possible without desegregating schools.

B. Sacrifice of Black Educators During Desegregation

The position of the African-American public school educator had actually begun to improve prior to the Supreme Court's opinion in *Brown I*. Beginning in the mid-1930s the NAACP took "separate but equal" as a given and filed many lawsuits attacking unequal salaries for black teachers in the black schools. Up to the mid-1940s the NAACP's education cases were primarily salary equalization lawsuits. Thurgood Marshall filed his first teacher salary equalization lawsuit on behalf of a black principal of a small school in Montgomery County, Maryland, in late 1936. Eight months later that suit ended with an agreement by the school board to equalize the salaries of black teachers.¹²¹ Over the next year, Marshall traveled to counties all over the state

University of Illinois, Chicago); ROBERT L. CRAIN, MAKING DESEGREGATION WORK 70 (1982); Rita E. Mahard & Robert L. Crain, *Research on Minority Achievements in Desegregated Schools*, in THE CONSEQUENCES OF SCHOOL DESEGREGATION 103-25 (Christine H. Russell & Willis D. Hawley eds., 1983); see Green, *Thinking Realistically About Integration*, 16 NEW PERSPECTIVES 35 (Fall 1984); Rita E. Mahard et al., *School Desegregation: An Evaluation of Predictions Made in Brown v. Board of Education*, 85 PSYCHOL. BULL. 217 (1978); *School Desegregation: Lessons of the First Twenty-Five Years*, LAW & CONTEMP. PROBS. 1, 1-133 (Summer 1978); S.W. Cook, *Social Science and School Desegregation: Did We Mislead the Supreme Court?*, 5 PERSONALITY & SOC. PSYCHOL. BULL. 420 (1979).

Later research that began to appear in the 1990s argued that the goal of desegregation should be seen, not in terms of performance on standardized tests, but in terms of improving the life chances of black students by moving them into an opportunity system much more likely to lead to success in American society. Segregation was thereby viewed as separation from mainstream opportunities—a self-perpetuating process which had lifelong and intergenerational effects that institutionalized inequality. Within this notion, then desegregation and integration were ways of breaking out of the isolation into a full range of middle-class opportunities affecting higher education, employment, and choice of community in which to live and raise children. These studies showed that there was a marked difference in college success for students who attended desegregated schools and they were much more likely to settle in integrated neighborhoods. See ORFIELD ET AL., *supra* note 106, at 105-06. This line of research would be promising, if America was not in a post-desegregation era.

In addition, while studies of individual school systems undergoing desegregation did not establish large increases in the performance of standardized tests, there was a significant improvement in the performance of African-American school children that occurred during the 1970s and 1980s. This was the height of the desegregation of American public schools. DAVID GRISSMER ET AL., THE BLACK-WHITE TEST (Christopher Jencks & Meredith Phillips eds., 1998); see also *infra* notes 177-83 and accompanying text.

121. See MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW 21-22 (1994).

of Maryland drumming up support for salary equalization lawsuits.¹²² Later the NAACP became involved in salary equalization cases all over the South including Norfolk, Virginia; Birmingham, Alabama; Little Rock, Arkansas; New Orleans, Louisiana; Tampa, Palm Beach, and Miami, Florida; Atlanta, Georgia; and Dallas, Texas.¹²³

Prior to the desegregation litigation in public schools, black teachers typically taught black school children. They were generally believed by whites to be too poorly educated to teach white school children. The Supreme Court's opinion in *Brown I* seemed to add credence to that notion. In one of the most quoted phrases from *Brown I*,¹²⁴ the Court said, "[t]o separate [African-American youth] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."¹²⁵ The Court went on to quote approvingly from the district court in Kansas:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children . . . for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children¹²⁶

Presumably, since segregated schools had harmed black children in ways unlikely to ever be undone, the harm also impacted black adults.¹²⁷ Because school boards and judges who crafted the desegregation plans considered black schools to be educationally inferior to white schools, the disproportionate impact on black school teachers and administrators should have been expected. Closing black schools, firing African-American teachers, and demoting black principals could be perceived not as discriminatory acts, but as reasonable efforts to increase the quality of education for all students, including the black ones.¹²⁸

122. *Id.* at 21-25.

123. *See id.* at 116-21.

124. Professor Derrick Bell notes that proponents of integration quoted this phrase repeatedly in order to justify their belief that integration provides the proper route to equality. Derrick A. Bell, *The Dialectics of School Desegregation*, 32 ALA. L. REV. 281, 285 (1981).

125. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954). The social science evidence cited by the Court was specifically intended to prove that segregation produced a psychological harm to African-Americans. *See id.* at 494 n.11.

126. *Id.* at 494.

127. In one of my early articles, I criticized the implicit racism upon which the Supreme Court's school desegregation jurisprudence was based. *See* Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 CORNELL L. REV. 1 (1992).

128. In some ways what happened to African-American schools was a repeat of the events of 100 years earlier when the Massachusetts state legislature attempted to desegregate the Boston public schools. Because whites would not send their children to black teachers, black school

Thus, the impact of the assumption that *de jure* segregation harmed only African-American school children expressed itself early in the process of desegregating public schools in the disproportionately high price that the black educators paid for desegregation.¹²⁹ Samuel Etheridge reported that between 1954 and 1972, over 70,000 black teachers lost their jobs in the southern and border states.¹³⁰ Testimony before the United States Senate revealed that 96% of the African-American principals lost their jobs in North Carolina, 90% in Kentucky and Arkansas, 80% in Alabama, 78% in Virginia, and 77% in South Carolina and Tennessee.¹³¹

teachers and assistants were fired. For a discussion of the desegregation of the Boston schools in the 1850s, see Arthur O. White, *The Black Leadership Class and Education in Antebellum Boston*, 42 J. NEGRO EDUC. 504, 513 (1973).

Not all courts were oblivious to this situation. The Fifth Circuit, for example, in *Singleton v. Jackson Municipal Separate School District*, 419 F.2d 1211, 1218 (5th Cir.), *rev'd*, 396 U.S. 290 (1970), specified criteria to use in the event it was necessary to reduce the number of principals, teachers, teachers aides, or other professional staff employed by a school district. The Fifth Circuit stated that any dismissal or demotions must be based upon objective and reasonable nondiscriminatory standards.

In addition if there is any such dismissal or demotion, no staff vacancy may be filled through recruitment of a person of a race, color, or national origin different from that of the individual dismissed or demoted, until each displaced staff member who is qualified has had an opportunity to fill the vacancy and has failed to accept an offer to do so.

Id.

129. For a further discussion of this issue, see Pamela J. Smith, *Our Children's's Burden: The Many-Headed Hydra of the Educational Disenfranchisement of Black Children*, 42 HOW. L.J. 133, 178-87 (1999); *see also* ALVIS V. ADAIR, *DESEGREGATION: THE ILLUSION OF BLACK PROGRESS* (1984); DERRICK BELL, *AND WE ARE NOT SAVED* 109 n.3 (1987) (citing Amicus Curiae Brief filed by the National Educational Association in *United States v. Georgia*, 445 F.2d 303 (5th Cir. 1971) (for empirical data on burden borne by black teachers, administrators, and students because of school integration)); JAMES E. BLACKWELL, *THE BLACK COMMUNITY* 158-60 (2d ed. 1985); and HAROLD CRUSE, *PLURAL BUT EQUAL* 22 (1987); HARRELL R. RODGERS, JR. & CHARLES S. BULLOCK, III, *LAW AND SOCIAL CHANGE* 94-97 (1972); David G. Carter, *Second-Generation School Integration Problems for Blacks*, 13 J. BLACK STUD. 175-88 (1982).

130. *See* Samuel B. Etheridge, *Impact of the 1954 Brown v. Topeka Board of Education Decision on Black Educators*, 30 NEGRO EDUC. REV. 213, 223-24 (1979). Another source put the number at more than 31,000 in southern and border states. Smith & Smith, *Desegregation in the South and the Demise of the Black Educator*, 20 J. SOC. & BEHAV. SCI. 28-40 (1974).

131. *Displacement and Present Status of Black School Principals in Desegregated School Districts: Hearings Before the U.S. Senate Select Comm. on Equal Educational Opportunity*, 92d Cong. (1971) (Statement of Benjamin Epstein). In addition, Epstein also testified that 50% of the African-American principals lost their jobs in Georgia and 30% did so in Maryland. *Id.*

V. DEVELOPMENTS IN EDUCATION INCREASING THE ATTRACTIVENESS
OF PUBLIC FUNDING OF PRIVATE EDUCATION AS A RESPONSE TO
THE EDUCATIONAL CONDITION OF BLACK SCHOOL CHILDREN
SINCE ITS INITIAL INTRODUCTION

We are now fifteen years beyond the time where America's public schools achieved the maximum amount of racial integration for African-Americans. Two developments since that time have begun to contribute to the resegregation of public schools. After having operated under school desegregation of plans for some time, a number of school districts are terminating federal court supervision. The termination of these desegregation plans allows school authorities to institute student assignment policies that are no longer motivated by a desire to maintain integrated schools. In addition, some lower federal courts have struck the use of racial classifications by public schools to promote voluntary school integration plans. The impact of these trends means that racial and ethnic separation in public schools will increase for the foreseeable future.

America's public school students are also becoming more racially and ethnically diverse. Unfortunately, the desire to increase the number of minorities in teaching has collided with the educational reform movement that began in the 1980s. Many reform panels placed a good deal of the blame for the failure of public education on school teachers. The result has been increased use of standardized testing of prospective teachers to screen out so called "unqualified" individuals from obtaining a degree in education or a teaching certificate. But since racial and ethnic minorities, particularly African-Americans, do considerably worse on the standardized tests these tests are functioning to screen out many potential black public school teachers. The result is that the number of African-American teachers has not kept up with the increases in black students.

Finally, the current state of performance of African-Americans in public schools is deplorable. Many educational statistics point to the reality that public education is failing to effectively educate the nation's black youth.

The educational situation of black school children has radically changed in the fifty years since white segregationist first proposed public funding of private education as a way to respond to attempts to integrate schools. New methods to respond to the educational crisis of African-American students now seem warranted. While public funding of private education may not be the answer for all black students, it could very well provide a very legitimate alternative for some African-American students.

A. Resegregation of Public Schools

There are two developments that are at work in public education that are leading to an increase in the amount of racial and ethnic separation in public schools. These trends are likely to continue for the foreseeable future. The result is that "we have already seen the maximum amount of racial mixing in public

schools that will exist in our lifetime."¹³²

The first trend relates to the termination of school desegregation decrees. In 1986, Norfolk, Virginia, became the first school district operating under federal court supervision to receive approval to dismantle its desegregation plan.¹³³ The dissolution of the desegregation decree allowed Norfolk to adopt a neighborhood school attendance policy and thereby create ten nearly all-black elementary schools.¹³⁴ Following Norfolk's lead, a number of school districts all over the country have terminated or are in the process of terminating their school desegregation decrees.¹³⁵ These include school districts of Buffalo, New York; Broward County (Fort Lauderdale), Florida; Clark County (Las Vegas), Nevada; Nashville-Davidson County, Tennessee; Duval County (Jacksonville), Florida; Mobile, Alabama; Minneapolis, Minnesota; Cleveland, Ohio; San Jose, California; and Wilmington, Delaware.¹³⁶ The dissolution of desegregation decrees allows school boards to adopt new student assignment measures, such as neighborhood school assignments or freedom of choice policies, that are not motivated out of a desire to maintain integrated student bodies. Since integrated student bodies is no longer the goal of these new student assignment policies, the inevitable result, like in Norfolk, is an increase in racial and ethnic segregation in the public schools.

The second trend points to the tremendous change in the interpretation of the Equal Protection Clause that has occurred over the past fifteen years. Since 1995, a number of lower federal courts have addressed equal protection challenges to the use of racial classifications of students for the purpose of fostering integrated student bodies when such efforts are not *required* to remedy a segregated school system.¹³⁷ These lower courts analyzed the constitutionality of the use of racial classifications by applying strict scrutiny. Most of the court decisions concluded that the state or local school officials failed either to articulate a compelling state interest to justify their admissions policies or, that the policies were not narrowly tailored. Thus, in one of the most stunning

132. James S. Kunen, *The End of Integration*, TIME, Apr. 29, 1996, at 40 (quoting Kevin Brown, Professor, Indiana University School of Law—Bloomington).

133. *Riddick v. Sch. Bd. of City of Norfolk*, 784 F. 2d 521 (4th Cir. 1986).

134. For a discussion of the effects of the termination of school desegregation in Norfolk, see Susan E. Eaton & Christina Meldrum, *Broken Promises: Resegregation in Norfolk, Virginia*, in ORFIELD ET AL., *supra* note 106, at 115-41. The author noted that the termination of the desegregation plan increased segregation in Norfolk schools, failed to increase parental involvement in the segregated schools—in fact, PTA membership actually declined in those schools; test scores of black students remained extremely low; and the achievement gap may actually have widened.

135. In *Board of Education of Oklahoma City v. Dowell*, 498 U.S. 237 (1991), the Supreme Court turned its attention to determining when a public school system complied with the equal protection mandate of eradicating the vestiges of segregation. The *Dowell* opinion has been followed by two other school desegregation termination opinions, *Missouri v. Jenkins*, 515 U.S. 70 (1995), and *Freeman v. Pitts*, 503 U.S. 467 (1992).

136. ORFIELD & YUN, *supra* note 95.

137. See, e.g., cases cited *supra* note 2.

reversals of constitutional adjudication in recent memory, federal courts which had encouraged voluntary integration plans in the 1960s, 1970s, and 1980s, are now finding those same plans to be unconstitutional.

The Supreme Court has never directly addressed the issue of the power of states and local school officials to take account of race and ethnicity of public school students in a context without an allegation of *de jure* segregation. This issue, however, was always in the background of the Supreme Court's school desegregation jurisprudence. This jurisprudence of the 1970s and 1980s assumed that state and local school officials could go further in terms of desegregating their public schools than the federal courts could order.¹³⁸ The principle that limited the power of federal courts enacting and approving school desegregation decrees was that the scope of the remedy is determined by the nature and extent of the constitutional violation.¹³⁹ But this limitation did not apply to state and local school officials.

The 1971 landmark opinion in *Swann v. Charlotte-Mecklenburg Board of Education*¹⁴⁰ was the most direct statement from the Supreme Court recognizing that school officials had broad powers to maintain integrated student bodies, while the remedial power of the federal courts was limited. Chief Justice Burger's unanimous opinion for the Court set out the guidelines for integrating schools, including approving busing as a tool to further that end.¹⁴¹ He warned federal courts that unless a skewed enrollment pattern is caused by unconstitutional student assignment practices, federal courts must defer to school officials' discretion and refrain from imposing remedies.¹⁴² Burger noted that the remedial power of federal courts extends only on the basis of a constitutional violation.¹⁴³ This authority, however, "does not put judges automatically in the shoes of school authorities whose powers are plenary."¹⁴⁴ Burger also noted that

[s]chool authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities¹⁴⁵

138. For a detailed explanation of this point, see Kevin Brown, *The Constitutionality of Racial Classifications in Public School Admissions*, 29 HOFSTRA L. REV. 1, 7-23 (2000).

139. *Milliken v. Bradley*, 418 U.S. 717, 714 (1974).

140. 402 U.S. 1 (1971).

141. *Id.* at 22-31.

142. *Id.* at 16.

143. *Id.*

144. *Id.*

145. *Id.*; see also *McDaniel v. Barresi*, 402 U.S. 39 (1971) (unanimously reversing the Georgia Supreme Court which had held that a desegregation plan voluntarily adopted by a local school board, which assigned students on the basis of race, was per se invalid because it was not color-blind.)

Until the last few years, lower courts accepted that public school authorities possess broad powers to take steps to promote integrated public schools.¹⁴⁶ But this acceptance began to erode in 1995 when the Supreme Court decided *Adarand Construction Co. v. Peña*.¹⁴⁷ In *Adarand* the Court held "that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."¹⁴⁸

The effect of these developments on racial and ethnic segregation in public schools can be seen in the statistics on school integration. Racial and ethnic mixing among student bodies held fairly consistent from the early 1970s until the late 1980s, but it has been on the increase over the past decade. Recent figures released by the Civil Rights Project of Harvard show that the trend of increasing racial and ethnic separation continues.¹⁴⁹ The percentage of white students in the schools of the average black student has declined since 1988 and in 2000 it is actually lower than in 1970.¹⁵⁰ As of 2000, 72% of black school children attend schools where minorities constitute a majority of the student population.¹⁵¹ The percentage of black students in schools that are more than 90% minority has increased to 37.4% in 2000.¹⁵² These two figures are significant increases from the 1996-97 school year where 68.8% of black school children attended majority minority schools with 35% attending schools that are at least 90% minority.¹⁵³

It is too early to tell how the Supreme Court's decision upholding the University of Michigan Law School's affirmative action program in *Grutter v. Bollinger*¹⁵⁴ will apply to efforts to use racial classifications to promote voluntary integration by public elementary and secondary schools. This is a subject that I am currently working on for another article. *Grutter* held that racial classifications could be used in an individualized admissions process as a means

146. See, e.g., *Vaughns v. Bd. of Educ.*, 742 F. Supp. 1275, 1301 (D. Md. 1990) (justifying the efforts to maintain integrated faculty assignments); *Willan v. Menomonee Falls Sch. Bd.*, 658 F. Supp. 1416, 1422 (E.D. Wis. 1987) ("It is well-settled in federal law that state and local school authorities may voluntarily adopt plans to promote integration even in the absence of a specific finding of past discrimination."); *Parent Ass'n of Andrew Jackson High Sch. v. Ambach*, 738 F.2d 574 (2d Cir. 1984); *Parent Ass'n of Andrew Jackson High Sch. v. Ambach*, 598 F.2d 705 (2d Cir. 1979).

147. 515 U.S. 200 (1995).

148. *Id.* at 227.

149. FRANKENBERG ET AL., *supra* note 105.

150. *Id.*

151. *Id.*

152. *Id.* Latinos actually experience higher rates of segregation than blacks. The percentage of Latinos in predominately minority schools is 76% and the percent in schools that are over 90% minority is also 37%. *Id.* at 33.

153. ORFIELD & YUN, *supra* note 95, at 14.

154. No. 02-241, 2003 U.S. LEXIS 4800 (U.S. June 23, 2003).

to pursue a diverse student body. If this holding is applied to elementary and secondary schools without modification, then some voluntary integration plans will survive. But this limited endorsement of school integration falls far short of the broad powers to promote integrated student bodies recognized by the Supreme Court in *Swann v. Charlotte-Mecklenburg v. Board of Education*.¹⁵⁵

*B. Condition of African-American Public School Teachers
and Administrators*

The role and position of the black educator in public schools has changed drastically over the past fifty years. In the days before the end of segregation, there were few occupational options for college-educated blacks except for the ministry and public education. In the 1950s half of all black professionals were public school teachers.¹⁵⁶ Because of the increased opportunities in American society today equally talented blacks have far more options. The teachers of the 1950s are the black lawyers, doctors, accountants, engineers, and business professionals of today. The black educator has lost the role of the preeminent professional in the black community.

The number of the black educators has been affected by more than the opening of other occupational options for talented blacks. About a decade after the losses in the number of black teachers caused by desegregation, another development occurred that has prevented the number of black school teachers from bouncing back—the educational reform movements of the past twenty years. Even as America's public school students are becoming more racially and ethnically diverse, the desire to increase the number of minority teachers is being thwarted by the education reform movement.

In 1983, the National Commission on Excellence in Education published its influential report *A Nation At Risk*.¹⁵⁷ In the report, the Commission stated that public schools were failing in their mission to educate students and were creating "a rising tide of mediocrity that threaten our very future as a Nation and a people."¹⁵⁸ This report and the educational reform movement it helped to spawn placed a good portion of the blame for the problem of public education on school teachers.¹⁵⁹ The typical criticism of teaching is that it does not attract high caliber students. The solution is to raise the academic standards for education majors and provide them with more rigorous training.

The call for higher teaching standards has frequently been answered through enforced teacher testing. Yet testing prospective teachers has had a devastating

155. 402 U.S. 1 (1971).

156. See Sabrina Hope King, *The Limited Presence of African-American Teachers*, 63 REV. EDUC. RES. 115, 124 (1993).

157. DAVID P. GARDNER ET AL., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* (1983).

158. *Id.* at 5.

159. See, e.g., *Carnegie Forum on Education and the Economy, A Nation Prepared: Teachers for the 21st Century* (1986).

impact on African-Americans interested in the profession because blacks are less likely to perform well on standardized tests. A 1997 report by the Educational Testing Service conducted between the years of 1994 and 1997 of over 300,000 people who took one or both of the Praxis tests revealed the difficulty minority teachers have in passing standardized tests, which have become the gateway for a public school teaching certificate.¹⁶⁰

The Praxis Series of tests are the only national teacher-testing program.¹⁶¹ The Praxis I test assesses reading, writing, and math ability. Passing this test is a prerequisite for acceptance into many degree-granting college programs in education. The Praxis II tests focus on content and pedagogical knowledge in specific subject areas. These tests are often used by states to determine qualifications for the initial teaching certificate. All minority groups, African-Americans, Hispanic, Asian American, Asian, Native American and Other, scored lower on both Praxis test than whites.¹⁶² Of the African-Americans who took the Praxis I test only 53.5% passed compared to 83.7% of all test takers and 86.7% of white test takers.¹⁶³ Thus, while blacks constituted 7.3% of those who took the test, they constituted only 4.6% of those who actually passed.¹⁶⁴ The

160. See Educ. Testing Serv., *The Academic Quality of Prospective Teachers: The Impact of Admissions and Licensure Testing* (1999).

161. The report looked at a three-year window from 1994 to 1997 of those who took the Praxis test. There were almost 600,000 tests takers during that period. *Id.* at 3. The report created two parallel data sets: one for candidates who took the SAT and one for candidates who took the ACT. They searched both SAT and ACT data sets from 1977 to 1995 and matched the most recent SAT/ACT scores with the Praxis scores and background information that came from the Praxis questionnaire and the SAT and ACT background questionnaire. Individuals who took both Praxis I and Praxis II during the 1994 to 1997 period were counted in both data sets. The report thus dealt with some 300,000 people who were in the teaching pipeline between 1994-1997. The authors of the report concluded that there was no compelling reason to believe that the sample's overall profile was skewed substantially with respect to that of the overall prospective teaching population. *Id.* at 13.

162. *Id.* at 18, 21.

163. *Id.* at 18, Table 4. The table actually breaks test takers down into those who took the SAT and those who took the ACT. There were a total of 33,770 people who took the SAT and Praxis I, of which 3603 were black and 27,506 were white and 54,797 people took the ACT and Praxis I of which 2829 were black and 49,548 were white. There was a total of 26,115 who took the SAT and Praxis I who passed, of which 1650 were black and 22,537 were white. There was a total of 48,036 who took the ACT and Praxis I who passed, of which 1790 were black and 44,293 were white. The total number of those who passed the test was 74,151 (26,115 + 48,036) out of a total of 88,567 (33,770 + 54,797) for a pass rate of 83.7%. The total number of blacks who passed Praxis I exam was 3440 (1650 + 1790) out of a total of 6432 (3603 + 2829) for a pass rate of only 53.5%. The total number of whites who passed Praxis I was 66,830 (22,537 + 44,293) out of a total of 77,054 (27,506 + 49,548) who took the exam for a pass rate of 86.7%.

164. *Id.* at 18, Table 4. The table actually breaks test takers down into those who took the SAT and those that took the ACT. There were a total of 33,770 people who took the SAT and Praxis I of which 3603 were black and 54,797 who took the ACT and Praxis I of which 2,829 were black.

same results can also be seen for the Praxis II tests as well. Of the blacks who took Praxis II 65.2% passed compared to 88.3% of test takers overall and 91.8% of whites.¹⁶⁵

There is a body of research which establishes a link between teacher verbal ability as measured by standardized tests and their student's achievement on standardized tests.¹⁶⁶ Scholars have also identified several important reasons why students of color stay in school longer and achieve more when they have teachers that look like themselves.¹⁶⁷ Teachers of color provide students of color with invaluable role models and examples of success that they can emulate.¹⁶⁸ More

Of the test takers there were a total of 26,115 of those who took the SAT and Praxis I who passed of which 1650 were black and 48,036 who took ACT and Praxis I of which 1,790 were black who passed. Those the total number of blacks who took the test were 6,432 (3603 + 2829) out of a total of 88,567 (33,770 + 54,797) or 7.3%. There were a total of 3,440 (1,650 + 1,790) blacks who passed Praxis I out of 74,151 (26,115 + 48,036) or 4.6%.

165. *Id.* at 21, Table 7. The table actually breaks test takers down into those who took the SAT and those that took the ACT. There were a total of 159,270 people who took the SAT and Praxis II of which 11,510 were black and 135,035 were white and 111,591 who took the ACT and Praxis II of which 11,111 were black and 98,846 were white. Of the test takers there was a total of 139,245 of those who took the SAT and Praxis II who passed of which 7984 were black and 122,534 who were white. There were a total of 99,804 who took ACT and Praxis II who passed of which 6757 were black and 88,583 were white. The total number of those who passed the test were 239,049 (139,245 + 99,804) out of a total of 270,861 (159,270 + 111,591) for a pass rate for all test takers of Praxis II of 88.3%. The total number of blacks who passed Praxis II exam was 14,741 (7984 + 6757) out of a total of 22,621 (11,510 + 11,111) for a pass rate of only 65.2%. The total number of whites who passed Praxis II was 211,117 (122,534 + 88,583) out of a total of 229,881 (135,035 + 94,846) who took the exam for a pass rate of 91.8%.

166. Educ. Testing Serv., *supra* note 160.

167. Rebecca Gordon et al., *Facing the Consequences: An Examination of Racial Discrimination in U.S. Public Schools* 21 (2000). Teachers of color also provide important benefits for white children as well. I am not discussing those benefits because of the general thesis of the comment.

168. In *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), the Supreme Court rejected the argument that providing role models for minority public school students was a compelling state interest. In 1972 because of racial tension in the community, the Jackson Board of Education considered adding a layoff provision to the Collective Bargaining Agreement between it and the Jackson Education Association (Union). The provision would protect certain minority groups of teachers against layoffs. The Board and the Union eventually agreed on a new provision for its collective bargaining agreement, which provided that

in the event that it becomes necessary to reduce the numbers of teachers through layoff from employment by the Board, layoffs teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff.

Id. at 270. When layoffs became necessary in 1974 it was obvious that adherence to this provision meant that some majority teachers with more seniority would be laid off in order to keep minority

particularly, teachers of color provide students of color with models of academic success where students of color are often expected not to succeed.¹⁶⁹ Teachers of color also share their students' cultural and life experiences and thus may be better able to respond to the particular difficulties that minority students face both in public school and in American society in general. They can reach out and work successfully with parents of students of color who are more likely to trust their judgment and evaluation of their children.¹⁷⁰ It may also be that teachers of color will hold higher expectation for students of color. Many studies have demonstrated that teacher expectations have a significant impact on how well students learn.¹⁷¹

Despite the evidence of benefits of teachers of color for students of color, the above trends suggests that the number of black educators will remain disproportionately low in relation to the percentage of black students. As of the spring of 1996, whites constituted 90.7% of public school teachers with blacks making up only 7.3%.¹⁷² In the 1993-94 school year 10.1% of school principals were African-Americans.¹⁷³ In contrast, the percentage of African-Americans in public schools in 2001-02 was 17.2%.¹⁷⁴

C. Current Education Condition of Black Students

The first place to look at in focusing on the educational condition of black students is the standardized tests scores. These tests have become the measures for much of our determination of a given student's academic success and ability. While standardized tests should not be the only means used to determine whether students are learning in public schools, the importance of these tests in

teachers with less seniority.

The Board's argument for the layoff provision was its interest in providing minority role models for minority students as an attempt to alleviate the effects of societal discrimination. The Court viewed the role model theory as analogous to societal discrimination. The plurality opinion noted that since the role model theory was not intended to be remedial it did not bear any relationship to the harm caused by prior discriminatory hiring practices. *Id.* at 283-84.

169. J. Stewart et al., *In Quest of Role Models: Change in Black Teacher Representation in Urban School Districts 1968-86*, 58 J. NEGRO EDUC. (1989).

170. John U. Ogbu, *Immigrant and Involuntary Minorities in Comparative Perspectives*, in MINORITY STATUS AND SCHOOLING: A COMPARATIVE STUDY OF IMMIGRANT AND INVOLUNTARY MINORITIES 3-33 (Margaret A. Gibson & John Ogbu eds., 1991).

171. See, e.g., Robert T. Tauber, *Good or Bad, What Teachers Expect from Students They Generally Get!*, ERIC DIGEST 97-7, at http://www.ericsp.org/pages/digests/good_or_bad.html; L. Jussim & J. Eccles, *Teacher Expectations: II. Construction and Reflection of Student Achievement* 63 J. PERSONALITY & SOC. PSYCHOL. (1992); and T.L. Good, *Two Decades of Research on Teacher Expectations: Findings and Future Directions*, 38 J. TEACHER EDUC. (1987).

172. Nat'l Ctr. for Educ. Statistics, *Selected Characteristics of Public School Teachers*, at <http://nces.ed.gov/pubs2002/digest2001/tables/dt070.asp>.

173. *Id.* at 95, Table 88.

174. See Young, *supra* note 12.

determining academic success is huge. The primary reason is that these tests are designed to assess the skills that are believed to be important to understanding a student's comprehension of various subject materials or to assess skills that are important to a student's success in school. It is thought that this cannot always accurately be done by focusing solely on grades because of the wide variations that exist in different courses taught in different schools by different teachers.

Despite the fact that high school GPA is a better predictor of success in colleges and universities, the SAT and the ACT are the tests that tend to determine where students will attend college or university.¹⁷⁵ The difference between the average SAT scores based on race (and ethnicity) is still dramatic. According to the College Board's 2001 National Report profiling SAT test takers, the gap between the SAT scores of African-Americans and that of whites is 201 points (1060 and 859, respectively).¹⁷⁶ After falling through the 1970s and 1980s,¹⁷⁷ the disheartening aspect is that the gap between the mean scores of African-Americans and whites has slightly increased over the past ten years.¹⁷⁸ Significant racial gaps can also be seen in the performance of blacks and whites on the ACT where the average score of African-Americans was 16.8 compared to whites at 21.7.¹⁷⁹ This gap held fairly consistent over the past five years.¹⁸⁰

The SAT and the ACT are tests taken by students who desire to attend post-secondary education. To get a hint of the existence of racial gaps for all elementary and secondary students, it is necessary to focus on other standardized tests. The National Assessment of Educational Progress was a program created by Congress in 1969. The purpose of the program has been to assess the trends in elementary and secondary student progress in certain academic areas, including reading, math and science. Since 1971 three age groups of students in

175. Jennifer Mueller, *Facing the Unhappy Day: Three Aspects of the High Stakes Testing Movement*, 11 KAN. J.L. & PUB. POL'Y 201, 206 (2002).

176. African-Americans constitute about 11.2% (120,506 of the 1,074,016) of those who take the SAT. See *The College Board, 2001 College-Bound Seniors: A Profile of SAT Program Test Takers* 6 (2001).

177. In 1975-76 the gap between the average SAT scores of African-Americans and whites was 257 (687 in comparison to 944). BLACK AMERICANS: A STATISTICAL SOURCEBOOK 106 (Louise L. Hornor ed., 2000) [hereinafter BLACK AMERICANS].

178. For the 1990-91 assessment year the gap was only 187 points (1031 as opposed to 846). In the 1996-97 assessment year the gap had increased to 195 points (1052 as opposed to 857) and in 1999-2000, it was 198 (1058-860). See Nat'l Ctr. for Educ. Statistics, *Scholastic Assessment Test (SAT) Score Averages by Race/Ethnicity*, at <http://nces.ed.gov/pubs2002/digest2001/tables/dt134.asp>.

179. ACT National and State Scores, at <http://www.act.org/news/data.html> (last visited June 18, 2003).

180. For students graduating in 1997 for example, the average ACT score for blacks was 16.4 compared to 21.2 for whites. All racial/ethnic groups American Indian, Mexican-American, Asian-American and Other Hispanic all scored lower on the ACT than Caucasians (18.0, 17.8, 20.4 and 18.1, respectively). See ACT National and State Scores, *The 1997 ACT High School Profile Report—National Normative Data*, at <http://www.act.org/news/data/97/t5-6-7.html>.

school—nine-, thirteen-, and seventeen-year-olds—have been tested. In reading, all three black age groups showed progress in closing the gap with white students on the tests from 1971 to 1988. The test scores of black students was increasing while the scores of white students remained essentially the same.¹⁸¹ These gaps began to widen thereafter as the scores of all black age groups fell while the scores of whites showed a modest rise.¹⁸² The gap in the performance on the science tests fell for all three age groups from 1970 to 1986 but it also began to rise during the 1990s.¹⁸³ While there were also significant gaps in the math scores, these gaps have remained generally constant since 1990.¹⁸⁴

In addition to the relatively poor performance of black students on standardized tests in public schools perhaps a more significant problem exists with school dropout rates. This problem cannot be completely separated from the performance on standardized tests because so many states now require passing a standardized test in order to receive a high school diploma. More than half of the states have exit exam policies in place, with six states require passage of a test to be promoted to the next grade level.¹⁸⁵ According to the United States Department of Commerce Bureau of the Census, 13.1% of African-Americans between sixteen and twenty-four dropped out of high school compared with only 6.9% of whites.¹⁸⁶ But these dropout rates may under-reflect high school dropout

181. The average scores of black nine-year-olds increased from 170 to 189, thirteen-year-olds from 222 to 243 and for seventeen-year-olds from 239 to 274. The corresponding scores of whites were 214 to 218, 261 to 261 (no change) and 291 to 295. See Nat'l Center for Educ. Statistics, *Trends in Average Reading Scale Scores, by Race, Age and Score Quartile*, <http://nces.ed.gov/programs/coe/2002/section2/tables/t08.asp>.

182. From 1988 to 1999 the scores of black nine-year-olds decreased from 189 to 186, thirteen-year-olds from 243 to 238 and for seventeen-year-olds from 274 to 264. The corresponding scores of whites went from 218 to 221, 261 to 267 and 295 to 295 (no change). As a result, the racial gaps for black nine-year-olds increased by six points; for thirteen-year-olds by eleven points; and for seventeen-year-olds by ten points. See *id.*

183. From 1970 to 1986 the gap in the scores of black nine-year-olds decreased from fifty-seven points to thirty-six points, thirteen-year-olds from forty-nine points to thirty-eight points and for seventeen-year-olds from fifty-four points to forty-five points, respectively. From 1986 to 1999 the gaps increased thirty-six points to forty-one points, thirty-eight points to thirty-nine points and forty-five points to fifty-two points, respectively. See *id.* at Table 13-3.

184. See Nat'l Ctr. for Educ. Statistics, *The Nation's Report Card, NAEP 1999 Long-Term Trend Mathematics Summary Data Tables for Age 9 Student Data*, at <http://nces.ed.gov/nationsreportcard/tables/Ltt1999/NTM11011.asp> (last visited June 19, 2003); Nat'l Ctr. for Educ. Statistics, *The Nation's Report Card, NAEP 1999 Long-Term Trend Mathematics Summary Data Tables for Age 13 Student Data*, at <http://nces.ed.gov/nationsreportcard/tables/Ltt1999/NTM21011.asp> (last visited June 19, 2003); Nat'l Ctr. for Educ. Statistics, *The Nation's Report Card, NAEP 1999 Long-Term Trend Mathematics Summary Data Tables for Age 17 Student Data*, at <http://nces.ed.gov/nationsreportcard/tables/Ltt1999/NTM31011.asp> (last visited June 19, 2003).

185. See Mueller, *supra* note 175, at 2009.

186. See U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, CURRENT POPULATION SURVEY, *Dropout Rates in the United States* (July 2001). The gap is larger for black males (15.3% dropout

rates because they include those who left school but later received GED credentials as high school completers. Four-year high school completion rates by race/ethnicity were reported by twenty-eight states in the 1997-98 school year. No state reported the African-American completion rate at higher than Maine's 83.3%. A total of sixteen states reported their four-year graduation rates for African-Americans in their schools at less than seventy percent. Those sixteen states (with corresponding figures for whites were as follows: Georgia 63.3% (71.4%); Idaho 65.3% (75.1%); Illinois 57.8% (84.9%); Iowa 67.6% (89.5%); Louisiana 53.7% (66.5%)¹⁸⁷; Missouri 60.1% (80.0%); Nebraska 56.3% (86.8%); Nevada 56.8% (69.4%); New Mexico 62.4% (77.9%); Ohio 60% (83.7%); Oklahoma 68.9% (80.2%); Pennsylvania 60.8% (88.6%); South Dakota 67.1% (88.1%); Utah 50.4% (83.6%); Wisconsin 54.8% (93.6%); and Wyoming 68.1% (79.0%).¹⁸⁸

rate contrasted with 7.0% for white males), than it is for black females (11.1% as opposed to 6.9%). Hispanics are reported to have substantially higher dropout rates (27.8%) than blacks.

187. Effective with the 1995-96 school year, Louisiana changed its dropout data collection which increased the number of their dropouts. In calculating the completion rates, 1995-96 data were used in place of older data.

188. See U.S. Department of Education, National Center for Education Statistics, Common Core of Data.

A study of high school graduation rates prepared for the Black Alliance for Educational Options was recently revised. See JAY P. GREENE, *HIGH SCHOOL GRADUATION RATES IN THE UNITED STATES* (2002). In the foreword to the study Kaleem Caire notes that current measures of high school dropouts which calculates those who receive GEDs as graduates understates the dropout rate. *Id.* at page 5. The author of the study calculates high school dropout rates by taking the 8th grade public school enrollment for each jurisdiction and sub-group from the fall of 1993 and the number of graduates from the Spring of 1998. To adjust for the possibility that students moving into or out of a school district would distort the graduation rate, he adjusted the 1993 figures to account for population change. The formula used to calculate the graduation rate was:

graduation rate = regular diplomas from 1998/adjusted 8th grade enrollment from 1993
adjusted 8th grade enrollment = actual 8th grade enrollment = (actual 8th grade enrollment x percentage change in total or ethnic sub-group enrollment in the jurisdiction between 1993-4 and 1997-8)

According to the study, of the eighth graders who entered high school in 1994-95 school year only 56% of African-Americans graduated compared to 71% of all students and 76% of Caucasian students graduated four years later. No state in the nation had an African-American graduation rate that exceeded the state average. Those states that were blacks were the closest were Arizona (5%), Arkansas (5%), New Mexico (7%) and North Carolina (8%). But even in these states the gap between black and white high school graduation rates were large, 16%, 7%, 16% and 13%, respectively. See Table 1 (revised April 2002). The lowest graduation rates for African-Americans were reported to be Wisconsin (40%), the same state which had the Milwaukee school voucher program. Wisconsin also had the third highest overall graduation rate (85% for whites 92%). Thus, the disparity between the graduation rates for blacks and whites were the largest in Wisconsin. The next lowest were Minnesota at 43% (compared to 82% overall, for whites 87%); Tennessee and Georgia both at 44% (compared to overall of 60% and 44% respectively and for whites of 64% and

Basic skills required in high school are almost essential for any type of economic success in the workforce. The failure to obtain a high school diploma is likely to have dire long term consequences. Among those over twenty-five years old who failed to complete high school or receive a GED, 55% report no earnings in the 1999 Current Population Survey of the U.S. Census, compared with only 25% of those with at least a high school diploma or a GED certificate.¹⁸⁹ In addition students who do not graduate from high school are also more likely to find their life leading to reliance upon public assistance and prison.¹⁹⁰

There is also evidence that African-American school children are victimized by a number of educational policies and practices in public schools that will affect their educational career. In 1999 community organizations in several U.S. cities undertook a study of their local school districts to see how they measured up in terms of racial justice. The organizations gathered data from twelve different cities.¹⁹¹ Two of the cities did not have any appreciable number of black students. Blacks were disproportionately suspended or expelled (and whites were under-represented in the number of those suspended or expelled) from school in every community that reported these figures.¹⁹² In addition, of the other ten school districts that were included, nine reported on the racial and ethnic percentage of students placed in gifted and talented programs. African-Americans were under-represented and whites were over-represented in every community.¹⁹³ National figures from the 1993-94 school year demonstrate that

61% respectively). In Ohio, the location of the Cleveland voucher program, the gap between high school graduation was also large. The graduation rate for African-Americans was only 49% compared to a state wide average of 77% and an average for whites of 82%. Florida's overall graduation rate of 59% was one of the worst in the country. Only Georgia (54%) and Nevada (58%) had lower overall graduation rates.

The study also reported graduation rates for selected cities. Milwaukee's was reported as 34% for blacks compared to 43% overall and 73% for whites. Cleveland's was 28% overall compared with 29% for blacks and 23% for whites. The graduation rates for whites in several cities was below 50% including Chicago School District 299 (45%); Clark County (49%); Cobb County (47%); Columbus City (45%); DeKalb County, Georgia (46%); Memphis City (39%); New York City (42%); Indianapolis, Indiana (44%); Newark, New Jersey (48%); Oakland (39%). *Id.* at Table 6.

189. See GREENE, *supra* note 188, at 6.

190. Phillip Kaufman et al., *Dropout Rates in the United States: 1999*, NAT'L CTR. EDUC. STATISTICS, at 1 (Nov. 2000).

191. Gordon et al., *supra* note 167, at 21. The cities included in the study were Austin, Texas; Boston, Massachusetts; Chicago, Illinois; Columbia, South Carolina; Denver, Colorado; Durham, North Carolina; Los Angeles, California; Miami-Dade, Florida; Missoula, Montana; Providence, Rhode Island; Salem, Oregon and San Francisco, California.

192. The greatest disproportions were in San Francisco 56% (18%); Austin, Texas 36% (18%); Los Angeles 30% (14%); and Providence, Rhode Island 39% (23%). *Id.* at 8.

193. *Id.* at 15. The largest under representations were in Boston 27% (55%); Durham 26% (58%); Providence 9% (23%); San Francisco 5% (18%); and Miami-Dade, Florida 23% (33%).

blacks are much more likely to be tracked into academically inferior education. The result of this is that they are exposed to a less rigorous academic experience.¹⁹⁴

CONCLUSION

It is not clear that school vouchers will lead to significant improvement in the educational outcomes of African-American school children.¹⁹⁵ There are legitimate fears that school vouchers may undermine the institution of public education. This concern, when it is expressed, is normally articulated in terms that discuss the effect of leaving poor (and often minority, including black) students in schools that are in disarray.¹⁹⁶ It is therefore a concern phrased—at least in part—in terms of the educational interest of black school children. But the problem with this concern is that it ignores the failure of public education to respond to the needs of African-American school children as a group. As educational statistics demonstrate, African-Americans as a group do not perform particularly well in public schools. From the perspective of the African-American community's struggle against its oppression, the failure of public education to adequately serve the interest of black school children may not alone be a reason to favor school vouchers. During the desegregation of public schools, the educational interest of countless African-American students and teachers was sacrificed in an effort to integrate American society. That sacrifice was justified due to the belief that the long term interest of the black community would be advanced by such a sacrifice.

When public funding of private education was first proposed, it was proposed by southern segregationists who sought to defy court-ordered integration. Supporting school vouchers and the possible consequence of the dismantling of public education was tantamount to siding with the most radical element of the segregationist movement. In this context, rejection of publicly funded private education was unquestionably in the best interest of the African-American community that was seeking to throw off the shackles of segregation.

We are almost fifty years after the Supreme Court's decision in *Brown v. Board of Education*, which generated the initial push for privatizing public education. America's schools are not moving towards greater racial and ethnic integration, but towards more racial and ethnic separation. Public schools today are more segregated than they were in 1970 and the trend is toward increasing that separation. In addition to the increasing segregation in public schools, the position of black public school teachers has changed drastically in the past fifty years. When the Supreme Court decided *Brown*, half of the professionals in the

194. For additional discussions of tracking but focusing on statistics from the 1993-94 school year, see Smith & Smith, *supra* note 130, at 197-203.

195. THOMAS L. GOOD & JENNIFER S. BRADEN, *THE GREAT SCHOOL DEBATE: CHOICE, VOUCHERS AND CHARTERS* 105-10 (2000).

196. See, e.g., PETER W. COOKSON, JR., *SCHOOL CHOICE: THE STRUGGLE FOR THE SOUL OF AMERICAN EDUCATION* 128 (1994); GOOD & BRADEN, *supra* note 195, at 105-10.

African-American community were public school teachers. Along with ministers, teaching was one of the few professional occupations open to college-educated African-Americans. As a result, they were among the intellectual elites in the black community. But now with so many African-Americans who have become doctors, lawyers, accountants, engineers, college professors, business managers, and other professional occupations, the public school teacher no longer stands at the same pinnacle in the African-American social hierarchy. Thus, the preservation of the black public school teacher is not as important to the advancement of the African-American community as it was during the *Brown* era. Even if it was, the educational reform movement over the past twenty years has been undermining the position of the black public school educator. In efforts to "improve" the quality of public school teachers, many educational programs and states require successful passage of standardized tests in order to obtain a diploma in education or a public school teaching certificate. The result is that while only 7.3% of public school teachers are black, 17.2% of public school students are black. (What may be even more startling is that 90.7% of public school teachers are non-Hispanic whites in contrast to only 60.3% of public school students.) This under representation of black public school teachers is unlikely to change given the disparate success rate on standardized tests necessary to receive an educational diploma and a teaching certificate.

In this Article, I am not seeking to advocate for or against school vouchers. The purpose of this Article is to point to the changes in American law and society that have occurred since the time when vouchers were first proposed fifty years ago. These changes have altered the nature of the debate regarding school vouchers and public education from the perspective of the African-American communities continuing struggle against its subordination. The end of school desegregation, the significant shortage of black teachers in public schools (at least in comparison to black students) and the continued failure of public education to close the gap in the educational performance of black school children have eliminated the obvious arguments that public funding of private education is contrary to the effort to eradicate racial subordination.

Simply put, the African-American community may no longer have a strong vested interest in objecting to the privatization of public education. The result should be that the interest of (black) parents choosing the best educational situation for their children should be the dominant consideration in the debate about school vouchers. African-Americans parents, like others, have always been concerned about their children receiving a quality education. A 1998 report underscored, moreover, the complexity of attitudes of African-American parents towards integration. It concluded:

For African-American parents, the most important goal for public schools-the prize they seek with single-minded resolve-is academic achievement for their children. These parents believe in integration and want to pursue it, but insist that nothing divert attention from their overriding concern: getting a solid education for their kids. And despite jarring experiences with racism over the years, their focus is resolutely on the here and now. They want to move beyond the past and prepare

their children for the future.¹⁹⁷

The desire of African-American parents to obtain a quality education for their children is justified because of the huge payoff derived from educational attainment and achievement. A recent U.S. Census Bureau report indicated that the average annual earnings of workers between twenty-five to sixty-four varies substantially based on educational attainment. For all workers with a professional degree their average annual income is \$99,300; for a master's degree \$54,500; for a bachelor's degree \$45,400; for an associate's degree \$33,000; some college \$31,200; high school graduate \$25,900; and for a non-high school graduate \$18,900.¹⁹⁸ These differences translate into huge differences in earnings over a lifetime. The comparable figures for African-Americans (with corresponding figures for whites) are \$2.5 million for a professional degree (\$3.1 million); bachelor's degree \$1.7 million (\$2.2 million); associate's degree \$1.4 million (\$1.6 million); some college \$1.2 million (\$1.6 million); high school \$1.0 million (\$1.3 million); non-high school graduate \$800 thousand (\$1.1 million).¹⁹⁹ Whether a student is fortunate enough to obtain college degree or a graduate degree begins with a good elementary and secondary education.

197. STEVE FARKAS & JEAN JOHNSON, *TIME TO MOVE ON*, PUBLIC AGENDA FOUNDATION (1998).

198. See *THE BIG PAYOFF: EDUCATIONAL ATTAINMENT AND SYNTHETIC ESTIMATE OF WORK-LIFE EARNINGS 2* (July 2002). The income gaps based on educational attainment increase when the focus is only on full-time year-round workers. Comparable income figures limited to full-time year-round workers is \$109,600; for a master's degree \$62,300; for a bachelor's degree \$52,200; for an associate's degree \$38,200; some college \$36,800; high school graduate \$30,400; and for a non-high school graduate \$23,400. See *id.*

199. *Id.* at 6. The percentage of African-Americans enrolled in professional schools and graduate programs steadily increased during the 1990s from 5.9% and 5.9% in 1990 to 7.6% to 9.3% in 1999. See Nat'l Ctr. for Educ. Statistics, *Participation in Education Table 6-2*, at http://nces.ed.gov/programs/coe/2002/section1/tables/t06_2.asp. The college completion rate for African-Americans over the age of 25 in 2000 was 16.5% (compared with 28.1% of whites). See Table 7, *Educational Attainment of the Population 25 Years and Over by Sex, and Race and Hispanic Origin: March 2000*, at <http://www.census.gov/population/socdemo/race/black/ppl-142/tab07.txt>. Where males hold a majority of the bachelor's (50.9% of the 24,331,000) and advanced degrees for whites (55% of the 12,734,000), black females hold 55.5% of the 2,279,000 blacks with bachelor's degrees and 58.1% of the 1,026,000 advanced degrees held by African-Americans. The percentage of blacks age eighteen to twenty-four enrolled in higher education was 29.8% in 1997. But as impressive as this increase has been, it does not equal the percentage increase of whites over the same period. The percentage of non-Hispanic whites enrolled in college increased from 27.4% to 40.6% and the percentage over the age of twenty-five that had completed college increased from 11.6% to 28.1%. BLACK AMERICANS, *supra* note 177, at 114. The 2000 figures come from the U.S. Census Bureau, Current Population Survey, Mar. 2000, Racial Statistics Population Division, at <http://www.census.gov/population/socdemo/race/black/ppl-142/tab07.txt> (Feb. 22, 2001).

RACE AND MONEY, COURTS AND SCHOOLS: TENTATIVE LESSONS FROM CONNECTICUT

PETER D. ENRICH*

INTRODUCTION

The idea of universal, free public education has long been a powerful force in American ideology. It gives content to the fundamental American creed of equality of opportunity. It draws upon our prevalent optimism about individual potential, our notion that, with the proper support, any child can achieve anything. It envisions a vital crucible for the distinctively American ideal of creating a single people from the diverse strands of our population.

From its inception, free public education has been conceived, almost universally in the United States, as an obligation of the individual states. Virtually every state constitution recognizes education as a central state responsibility.¹ Yet, almost as universally, the actual task of funding and operating the public schools has been delegated to local communities, drawing in large measure on local resources.

The result of this devolution of authority has been a reality that falls far short of the ideal. Because of the residential segregation—by both race and class—that has become an increasingly predictable feature of the American geography, our public school systems have come to be sharply divided along lines of color and socioeconomic status. Additionally, because of the dependence on local funding sources for school budgets, the resources available to schools serving these very different populations have also become starkly divergent, with relatively generous funding for affluent suburban districts and meager support for many urban and rural districts.² To complete the vicious cycle of inequality, the resultant disparities in school resources and quality exert a powerful influence on residential location decisions and on real estate values, exacerbating the patterns of residential segregation.

By the latter part of the Twentieth Century, the result in virtually every state was that our system of public education had become, not a force for equality, opportunity, and inclusion, but rather one of the central mechanisms that reinforced and reproduced from generation to generation America's tacit caste system of race and class. Poor children and children of color are predominantly channeled into underfunded, underperforming schools where their opportunities

* Professor, Northeastern University School of Law. A.B., Yale College; J.D., Harvard Law School. I am indebted to the able research assistance of Keir Bickerstaffe, Erica Crews, Jessica Faige, Margaret Fox, Karin Gechter, and Rebecca Stallman.

1. See Peter D. Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 105-06 & n.16 (1995); Robert M. Jensen, *Advancing Education Through Education Clauses of State Constitutions*, 1997 B.Y.U. EDUC. & L.J. 1, 3 ("All fifty state constitutions contain an education clause designed to establish some form of educational system.").

2. For a vivid description of these inequalities and their impacts, see JONATHAN KOZOL, *SAVAGE INEQUALITIES* (1991).

for educational achievement and advancement are severely restricted.³ Children from well-to-do white families almost universally receive their schooling in adequately endowed public or private schools, which serve as natural stepping stones to post-secondary education and to economic success. Thus, the opportunities for each succeeding generation are largely dictated by the circumstances of their parents.⁴

Concurrent with the growing recognition of the chasm between the ideal and the reality of American public education, the latter half of the Twentieth Century also marked the emergence of another striking phenomenon—the surprising prospect that the legal system, the Constitution, and the courts could offer powerful tools for attacking and remedying social inequalities. Starting in the 1950s, Chief Justice Warren's Supreme Court issued an array of decisions, sweeping across broad swaths of the legal landscape, challenging entrenched systems of hierarchy and subordination.⁵ A whole generation of reformers and social activists (my generation, in fact) learned to think of law and the judicial system, not as a central conservative bulwark of the established order,⁶ but as a primary pathway for recognition and redemption of the rights of the downtrodden and disenfranchised.

The system of public education was one of the primary institutional targets of this judicial revolution, with *Brown v. Board of Education* and its progeny⁷ providing perhaps the most resonant model for the redemptive potential of the courts and the Constitution. The early desegregation cases held out the promise that law could be used to restore the public school system to its rightful role as the guarantor of equality and opportunity for all. Indeed, this promise shone so bright that, even when a series of Supreme Court decisions in the early 1970s eviscerated the Federal Constitution as a tool for education reform,⁸ activists simply redirected their energies to state courts and state constitutions in the

3. See, e.g., Diana Jean Schemo, *Neediest Schools Receive Less Money, Report Finds*, N.Y. TIMES, Aug. 9, 2002, at A10 (describing study by the Education Trust, finding systematic underfunding of schools serving poor and minority children); David Dante Troutt, *Ghettoes Revisited: Antimarkets, Consumption, and Empowerment*, 66 BROOK. L. REV. 1, 23-24 (2000).

4. See KOZOL, *supra* note 2, at 104-06 (describing poor students' recognition of the caste system within which they are educated).

5. See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964) (applying one person, one vote standard to state legislative apportionment); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (requiring court appointed counsel in all felony prosecutions); *Engel v. Vitale*, 370 U.S. 421 (1962) (forbidding prayer in school).

6. Cf. ARNOLD M. PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW* (1976) (discussing this more familiar role of law in American society).

7. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Griffin v. County Sch. Bd.*, 377 U.S. 218 (1964); *Green v. County Sch. Bd.*, 391 U.S. 430 (1968).

8. See, e.g., *Milliken v. Bradley*, 418 U.S. 717 (1974); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). See also *Washington v. Davis*, 426 U.S. 229 (1976) (building on *Jefferson v. Hackney*, 406 U.S. 535 (1972) and *Keyes v. Sch. Dist.*, 413 U.S. 189 (1973) to conclude that the Equal Protection Clause only applies to intentional discrimination).

continuing pursuit of judicial transformation of the education system.

Those state court efforts have met with impressive, if far from universal, success. Since 1970, courts in half of the states have found that their decentralized systems of public education did not satisfy state constitutional norms of equity or adequacy.⁹ These decisions suggest the continuing efficacy of law and litigation as the tools of social reform. However, in most of these cases, the judicial triumph marked the beginning, not the end, of institutional change.¹⁰ Courts characteristically limit their decisions to a finding that the existing system fails to satisfy constitutional obligations. The burden of forging a constitutional alternative falls to the legislative and executive branches, and they, too often, approach this judicially assigned task with attitudes ranging from caution and confusion to resentment and resistance.¹¹ While the legislative responses in some states have been swift and substantial,¹² in a number of others the process has dragged on for years, resulting in an ongoing and unproductive

9. For a description of the reported cases decided up to 1993, see the Appendix to Enrich, *supra* note 1, at 185-194 (identifying fifteen states—Alabama, Arizona, Arkansas, California, Connecticut, Kentucky, Massachusetts, Montana, New Hampshire, New Jersey, Tennessee, Texas, Washington, West Virginia, and Wyoming—finding unconstitutionality, and seventeen—Colorado, Georgia, Illinois, Maryland, Michigan, Minnesota, Nebraska, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Virginia, and Wisconsin—declining to find unconstitutionality). Subsequent to 1993, five more states (Idaho, New York, Ohio, Vermont, and South Carolina, three of which were previously in the “constitutional” column) have joined the ranks of those with reported decisions imposing constitutional standards on their state’s systems, while four (Florida, Louisiana, Maine, and Rhode Island) have joined the ranks of those with decisions declining to find unconstitutionality. In addition, the website maintained by the Advocacy Center for Children’s Educational Success with Standards (ACCESS) identifies five more states (Alaska, Kansas, Missouri, New Mexico, and North Carolina) in which unreported lower court decisions finding unconstitutionality have not been appealed. See ACCESS website, at <http://www.ACCESSednetwork.org/states/index.htm> (last visited Jan. 20, 2003).

10. Of course, in some cases, the judicial victory itself was far from the first step in the interplay between litigation and political action. In Massachusetts, for example, the pendency of a legal challenge to the state’s school funding system was a major impetus to two dramatic reforms of the system before the suit was addressed by the courts in *McDuffy v. Secretary of Executive Office of Education*, 615 N.E.2d 516 (Mass. 1993).

11. For a recent example of resistance, see Maeve Reston, *N.H. Nervously Awaits Reforms*, BOSTON GLOBE, Nov. 17, 2002, at B7 (discussing New Hampshire’s incoming governor’s support of a constitutional amendment to limit the state supreme court’s ability to weigh in on the school-funding system); James Vaznis, *School Funding Key Issue*, BOSTON GLOBE, June 30, 2002, at A1 (describing Republican support for such a constitutional amendment and the difficult road to passing it).

12. Kentucky and Massachusetts provide examples of speedy and substantial responses. For a description of developments in Kentucky, see Molly A. Hunter, *All Eyes Forward: Public Engagement and Educational Reform in Kentucky*, 28 J.L. & EDUC. 485, 498-99 (1999). In Massachusetts, reform legislation was signed within days after the state’s Supreme Judicial Court declared the unconstitutionality of the pre-existing system. See Enrich, *supra* note 1, at 176.

interplay between the courts and the “political”¹³ branches.¹⁴ The result, notwithstanding the string of judicial victories, continues in many states to be an educational system riven by deep social, economic, and racial divisions.¹⁵

One of the central questions raised by this history is the plausibility of my generation’s hopeful vision of the law as a transformative force with which to right societal injustices. In part, this is a question about the degree to which courts will have the courage or the inclination to apply constitutional ideals to entrenched institutional structures.¹⁶ But a second aspect of the question may raise more profound concerns about the viability of my generation’s hopes: even when the courts do take up the mantle of social justice, to what extent can the interventions of this “least dangerous branch”¹⁷ actually catalyze meaningful institutional change?

The answer to this question is neither simple nor univocal, even when the focus is limited to the single example of school reform.¹⁸ Among the states whose school systems have been found constitutionally flawed, both the ensuing political processes and the ultimate scope of the resultant reforms vary across a very wide range. It seems that these variations reflect no simple discernible pattern, but rather the workings of multiple contingent features of the individual situations. The appropriate question, then, is not *whether* judicial interventions can be transformative, but rather when and under what specific circumstances. The answers, if any, are likely to be found only by a close examination of particular instances.

The purpose of this article is to seek hints at the answers to these questions

13. While it is customary to refer to the legislature and executive as the “political” branches, it is important to recall that, by contrast to the lifetime appointments of federal judges, many state court judges are elected and serve for fixed terms, and hence are far more “political” than their federal counterparts. See 34 THE BOOK OF THE STATES 209-11 (2002) (describing judicial selection systems in the fifty states).

14. For two dramatic examples, consider the cases of New Jersey (see, for example, Paul L. Trachtenberg, *The Evolution and Implementation of Educational Rights Under the New Jersey Constitution of 1947*, 29 RUTGERS L.J. 827 (1998)), and Texas (see, for example, J. Steven Farr & Mark Trachtenberg, *The Edgewood Drama: An Epic Quest for Education Equity*, 17 YALE L. & POL’Y REV. 607 (1999)). See also Charles Benson, *Definitions of Equity in School Finance in Texas, New Jersey and Kentucky*, 28 HARV. J. ON LEGIS. 401 (1991).

15. See Schemo, *supra* note 3.

16. See Karen Swenson, *School Finance Reform Litigation: Why Are Some State Supreme Courts Activist and Others Restrained*, 63 ALB. L. REV. 1147 (2000) (seeking empirical explanation for different approaches and outcomes in different states’ courts).

17. THE FEDERALIST No. 78, at 436-37 (Alexander Hamilton) (Isaac Kramnick ed., 1987). Hamilton explained, “The judiciary, on the contrary, has no influence over either the sword or the purse, no direction either of the strength or the wealth of the society.” *Id.*

18. Cf. Douglas S. Reed, *Twenty-Five Years after Rodriguez: School Finance Litigation and the Impact of the New Judicial Federalism*, 32 LAW & SOC’Y REV. 175, 205-14 (1998) (offering a general framework through which to assess forces influencing variable impacts of school finance cases).

through a case study of a single state's experience with educational reform litigation. I use Connecticut as my example because its history in this area over the past thirty years has been peculiarly rich, involving two quite different legal challenges to the educational status quo: first *Horton v. Meskill*,¹⁹ which challenged the resource disparities between rich and poor Connecticut school districts, and second *Sheff v. O'Neill*,²⁰ which focused on the racial and economic segregation fostered by Connecticut's school districting. In each case, the state supreme court found a violation of the state constitution; yet, the two cases have produced two quite distinct institutional responses. By exploring these two cases, and particularly the ways in which the political process has responded to them, some tentative lessons may emerge about the efficacy of the courts and constitutional law as instruments of social reform.

In the ensuing section, I depict some of the legal context from which the Connecticut cases arise, with particular attention to the key preceding developments in federal constitutional law. In the next three sections, I offer a brief history of the Connecticut cases and the responses to them: Part II discusses *Horton*; Part III addresses *Sheff*; and Part IV considers some significant recent developments, including renewed litigation in *Sheff* and the initiation of a new suit revisiting the issues from *Horton*.²¹ Finally, in Part V, I attempt to distill some tentative lessons from Connecticut's experience.

I. SETTING THE STAGE: THE LEGAL CONTEXT FOR THE CONNECTICUT SCHOOL CASES

In the iconography of progressive judicial activism, perhaps the most hallowed place belongs to *Brown v. Board of Education*, and for good reason.²² In *Brown*, the Supreme Court confronted one of the most vivid and entrenched instruments of American inequality, the explicit and deliberate racial segregation of public schools. The Court directly acknowledged segregation's profound social impacts and firmly declared its incompatibility with constitutional norms. Over the ensuing years, the Court's bold and forthright challenge to school segregation served as the shining example that unleashed the capacity of the federal courts and the Constitution as the agents of egalitarian social transformation.

At the same time, *Brown* placed a special focus on issues of educational

19. The *Horton* plaintiffs brought constitutional challenges that resulted in two pertinent Connecticut Supreme Court cases. First was *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977) (*Horton I*). Second, after the legislature's attempt to correct the constitutional wrongs found in *Horton I*, the *Horton* plaintiffs' challenge to the legislative remedy led to *Horton v. Meskill*, 486 A.2d 1099 (Conn. 1985) (*Horton III*). See also *Horton v. Meskill*, 445 A.2d 579 (Conn. 1982) (*Horton II*) (addressing procedural issues that are outside the scope of this Article).

20. 678 A.2d 1267 (Conn. 1996).

21. *Johnson v. Rowland*, No. X03-CV-04921035 (Conn. D. Ct.).

22. 347 U.S. 483 (1954). For a detailed history of *Brown*, see RICHARD KLUGER, *SIMPLE JUSTICE* (1975).

rights. It was, of course, as much a case about schools as about race. The *Brown* Court underscored, in ringing language, the centrality of educational opportunity to American values and aspirations:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.²³

In the long string of school segregation cases that followed in *Brown*'s wake, the Court repeatedly reaffirmed the seriousness of its commitment to break down the barriers that segregation posed to equal educational opportunity.²⁴ These cases sent two powerful messages: first that the courts were ready and able to redress deep-seated social injustices, and second that public education was an institution of special importance in addressing issues of equality and opportunity. While courts had long provided a forum for a variety of disputes about school districting and school funding,²⁵ the desegregation cases introduced and encouraged a far more radical and transformative role for the courts in addressing issues of educational opportunity.

There can be little question that *Brown* and its progeny had a profound practical impact on schools and other segregated institutions in much of the country.²⁶ However, in the years following *Brown*, the limitations of the desegregation cases became increasingly evident. Some of the limitations

23. *Brown*, 347 U.S. at 493. This passage has been quoted over and over in later federal and state school cases. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 111 (1973) (Marshall, J., dissenting); *Sheff v. O'Neill*, 678 A.2d 1267, 1289 (Conn. 1996); *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 190 (Ky. 1989); *Serrano v. Priest*, 487 P.2d 1241, 1256-57 (Col. 1971).

24. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Griffin v. County Sch. Bd.*, 377 U.S. 218 (1964).

25. See, e.g., *Garrett v. Colbert County Bd. of Educ.*, 50 So. 2d 275 (Ala. 1950); *Moore v. Bd. of Educ.* 193 S.E. 732 (N.C. 1937).

26. The most dramatic impacts were, of course, in the South, where de jure segregation had been the norm. See GARY ORFIELD & SUSAN E. EATON, *DISMANTLING DESEGREGATION* 14-15 (1996). However, the impacts were by no means confined to that region. See, e.g., *Missouri v. Jenkins*, 495 U.S. 33 (1990) (approving extensive remedies for segregation of Kansas City, Missouri school system); *Keyes v. School Dist.*, 413 U.S. 189 (1973) (requiring desegregation of the Denver school system); ANTHONY LUKAS, *COMMON GROUND* (1986) (tracing the practical impacts of the Boston school desegregation case).

emerged in the doctrinal evolution of the applicable constitutional principles. Others reflected the depth of societal resistance to judicially imposed change. Together they resulted in changes that were far more difficult and far less sweeping than the proponents of desegregation initially hoped.

On the doctrinal side, perhaps the critical weakness of the desegregation strategy arose with the judicial distinction between de jure and de facto segregation. While the early school cases all involved clear instances of de jure segregation, the Court's focus was on the segregation, not its source.²⁷ In fact, it was not until nearly twenty years later that the Court, in *Keyes v. School District No. 1*,²⁸ actually decided that the Fourteenth Amendment only applied where there was a finding of a governmental "purpose or intent" to segregate.²⁹ Yet, prior to *Keyes*, the Court's rulings had raised substantial doubts about the availability of constitutional remedies to rectify the school segregation due to housing patterns and municipal boundaries that predominated outside of the South.³⁰

The most problematic corollary arising from the narrowing of constitutional remedies to cases of intentional segregation was the unavailability of desegregation remedies that extended across school district lines, in the absence of a showing that the lines had been drawn with a discriminatory purpose.³¹ The Court's decision in *Milliken v. Bradley* meant that the Fourteenth Amendment could offer no meaningful relief for Detroit's starkly segregated schools, nor for those of many other metropolitan areas where racial separation in the schools was effectively reinforced by political boundaries between cities and suburbs. By limiting scrutiny to cases of deliberate segregation, the Court rendered the Fourteenth Amendment's protections meaningless for vast numbers of students of color attending segregated, often inferior, schools.

Even in the cases where de jure segregation was proven, judicial relief proved disappointing. The intransigence and foot-dragging of local officials ensured that most Southern schools remained sharply segregated for many years after *Brown*, although more meaningful progress was achieved after passage of

27. See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 7 (1958) (focusing on obligation "to eliminate racial segregation from the public schools"); *Brown*, 347 U.S. at 495 (holding simply that "[s]eparate educational facilities are inherently unequal," without any mention of presence or absence of discriminatory intent).

28. 413 U.S. 189, 205 (1973).

29. *Id.* (emphasis in original). Even then, the Court reached its conclusion over the strenuous objection of Justice Powell, who preferred to focus on the fact of racial segregation, not its cause. See *id.* at 224 (Powell, J., concurring).

30. See, e.g., UNITED STATES COMMISSION ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 262 (1967) ("[C]ourts have not been so ready to declare adventitious school segregation unconstitutional. Thus, the result of most judicial decisions thus far has been to leave the question of remedying racial imbalance to the legislative and executive branches of the Federal and State Governments.").

31. See *Milliken v. Bradley*, 418 U.S. 717, 745 (1974).

the 1964 Civil Rights Act.³² Throughout the nation, reluctance to adopt or require busing and similar strategies, combined with the phenomenon of "white flight" from the urban districts where most students of color remained, rendered the challenges of segregation increasingly intractable.³³ Thus, despite some successes, *Brown's* promise of transformed educational opportunities for minority children went largely unfulfilled.³⁴

One response to disappointment over the efforts at school desegregation was the emergence of a new litigation strategy, focusing on money rather than race. Starting in the mid-1960s, a flurry of lawsuits were filed challenging, not the assignment of students to schools, but the allocation of dollars to school districts.³⁵ The central argument of these cases, some of which were initiated by the same groups that had been behind the desegregation cases,³⁶ was that systems of school funding that depended heavily on local property taxes (as was the case in virtually every state) violated the Constitution's equal protection guarantee, because these systems provided dramatically disparate support for a critical governmental function in different school districts, based solely on the relative wealth of those districts.³⁷ The pattern that these cases painted, in state after state, revealed rich school districts with property wealth many times that of their poorer neighbors supporting education spending and services radically superior to those of the poorer districts (which commonly included the urban school systems serving the preponderance of minority children).³⁸ The primary goal was

32. See ORFIELD & EATON, *supra* note 26, at 7 ("By 1964, only one-fiftieth of Southern black children attended integrated schools."); Frank M. Johnson, Jr., *School Desegregation Problems in the South: An Historical Perspective*, 54 MINN. L. REV. 1157 (1970).

33. See, e.g., UNITED STATES COMMISSION ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 115 (1967) (discussing obstacles to effective remedies for racial isolation); KLUGER, *supra* note 22, at 765-66 (discussing resistance to busing); Mark G. Yudof, *Equal Educational Opportunity and the Courts*, 51 TEX. L. REV. 411, 470-72 (1973) (discussing the bleak prospects for future integration).

34. See, e.g., ORFIELD & EATON, *supra* note 26, at 1-22 (tracing the disappointing record of efforts at desegregation from *Brown* to the 1990s); Robert L. Carter, *Public School Desegregation: A Contemporary Analysis*, 37 ST. LOUIS U. L.J. 885 (1993) (discussing failings of desegregation movement).

35. See, e.g., *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971); *Van Dusartz v. Hatfield*, 334 F. Supp. 870 (D. Minn. 1971); *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd mem. sub nom.* *McInnis v. Ogilvie*, 394 U.S. 322 (1969).

36. See Enrich, *supra* note 1, at 121 n.97 (discussing role of civil rights and anti-poverty organizations in the early education financing cases).

37. See, e.g., *Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280 (W.D. Tex. 1972), *rev'd*, 411 U.S. 1 (1973); *Serrano v. Priest*, 487 P.2d 1241 (1972).

38. See, e.g., *Rodriguez*, 337 F. Supp. at 282 (contrasting rich and poor districts in San Antonio). The correlations between property wealth and family income (and race) were, however, less than perfect, due to the fact that many urban districts included substantial commercial property with high values. See Michael J. Churgin et al., Note, *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars*, 81 YALE L.J. 1303 (1972).

to secure better funding for these poorer districts and to thereby provide equal educational opportunities even for those students relegated to economically or racially isolated schools.

The rise of these funding-based equal protection cases reflected several trends, in addition to frustration with the disappointing results of the desegregation cases.³⁹ One important development was the shift in focus among civil rights advocates from fighting segregation to empowering people of color, a shift that suggested that integration of schools was less important than providing minority students with opportunities for educational excellence.⁴⁰ Another important development was the emergence of the "War on Poverty" as a central focus of progressive efforts, a development which kindled enthusiasm for establishing a constitutional prohibition against discrimination on the basis of wealth.⁴¹ A third was the accumulation of a wide range of Supreme Court case law that appeared to provide critical precedential support for extending equal protection arguments to educational inequalities based on resources, not on race.⁴²

After some early successes,⁴³ the constitutional assault on education funding ran aground with the Supreme Court's 1973 decision in *San Antonio Independent School District v. Rodriguez*.⁴⁴ In *Rodriguez*, a sharply divided Court set a limit to the reach of its equal protection jurisprudence by restricting the most rigorous judicial scrutiny to cases impinging on either a fundamental constitutional right or an insular minority. It went on to find that neither educational rights nor the interests of poor communities triggered such scrutiny. As a result, the Court concluded that a state's interest in providing local communities with control over their own schools could justify a system of local districts reliant on local funding, notwithstanding the inequities such a system might cause.⁴⁵ While it is fascinating to speculate how different our educational and legal systems might have been if one vote on the Court had switched,⁴⁶ the *Rodriguez* ruling

39. For a general discussion of the factors influencing this trend, see Enrich, *supra* note 1, at 115-128.

40. See *id.* at 123 & nn.105-06 and sources cited therein.

41. See Eric A. Hanushek, *When School Finance "Reform" May Not Be Good Policy*, 28 HARV. J. ON LEGIS. 423, 424 (1991) (noting that "[s]chool finance reform tended to be viewed as another element of the War on Poverty"). See generally JEROLD S. AUERBACH, *UNEQUAL JUSTICE* 268-72 (1976) (tracing rise of the poverty law movement).

42. See generally ARTHUR E. WISE, *RICH SCHOOLS, POOR SCHOOLS: THE PROMISE OF EQUAL EDUCATIONAL OPPORTUNITY* (1968) (articulating the multiple strands of the equal protection argument); Enrich, *supra* note 1, at 116-21.

43. See, e.g., *Rodriguez*, 337 F. Supp. 280; *Van Dusartz v. Hatfield*, 334 F. Supp. 870 (D. Minn. 1971); *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1972); *Milliken v. Green*, 203 N.W.2d 457 (Mich. 1972), *vacated and rev'd*, 212 N.W.2d 711 (Mich. 1973).

44. 411 U.S. 1 (1973).

45. *Id.*

46. Such speculation is particularly intriguing in light of the fact that only one of the five Justices in the slender *Rodriguez* majority (Justice Stewart) was on the Court in 1968 when the suit

effectively brought an end to the effort to challenge school district funding under the Federal Constitution.

Rodriguez did not, however, put an end to legal challenges to school funding inequities. Instead, it simply shifted the focus of such challenges away from the Federal Constitution and onto state law. Even before *Rodriguez* was decided, a number of the early cases, while litigated primarily under federal constitutional law, reached decisions that were based, at least in part, on findings of violations of state constitutional rights.⁴⁷ Within days after the *Rodriguez* decision, the New Jersey Supreme Court, in an opinion evidently crafted before *Rodriguez*'s outcome was known,⁴⁸ struck down the state's locally funded system exclusively on the basis of the state constitution's provision mandating "a thorough and efficient system of free public schools."⁴⁹ Building on these foundations, advocates in many jurisdictions turned to their state constitutions and state courts to continue the legal struggle for equality in educational funding.⁵⁰ The shift from challenges focused on race to those focused on money was undeterred by the loss of a federal constitutional basis; it simply proceeded in a different, state-based forum.

II. *HORTON V. MESKILL*: CONNECTICUT TACKLES FUNDING INEQUITIES

Connecticut's system of school funding was one of the first to be challenged in a post-*Rodriguez* lawsuit grounded primarily in the state constitution. *Horton v. Meskill*, which was filed in November 1973, just a few months after the *Rodriguez* decision, still included a count grounded in the Federal Equal Protection Clause, but its central claims rested on Connecticut's own equal protection provisions⁵¹ and on the state constitution's recently enacted provision assuring that "[t]here shall always be free public elementary and secondary schools in the state."⁵² As in the earlier cases focused on the Federal

was filed. Its outcome largely depended on the accidents of death and retirement while the case proceeded through the courts.

47. See, e.g., *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971), *aff'd*, 557 P.2d 929 (Cal. 1976) (affirmed solely on state constitutional grounds). The Michigan Supreme Court reached a similar decision, resting on both state and federal constitutional reasoning, in *Milliken v. Green*, 203 N.W.2d 457 (Mich. 1972), *rev'd*, 212 N.W.2d 711 (Mich. 1973) (reversed the state constitutional holding on rehearing, after the Supreme Court's decision in *Rodriguez* (and after changes in the composition of the Michigan court)).

48. See *Robinson v. Cahill*, 303 A.2d 273, 279 (N.J. 1973).

49. *Id.* at 295.

50. Among the early post-*Rodriguez* cases were *Seattle School District No. 1 v. State*, 585 P.2d 71 (Wash. 1978); *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979); *Board of Education v. Walter*, 390 N.E.2d 813 (Ohio 1979); and *Horton I*, 376 A.2d 359 (Conn. 1977), to which we turn our attention below. See Enrich, *supra* note 1, at 185-94, for a complete list of the state constitutional cases decided between 1973 and 1993.

51. CONN. CONST. art. I, §§ 1 & 20.

52. CONN. CONST. art. VIII, § 1. The provision goes on to say, "[t]he general assembly shall

Constitution, plaintiffs' central argument was that Connecticut's heavy reliance on local property taxes to fund public education violated the rights of students in poorer districts to an equal educational opportunity.

Then and now, Connecticut's demographics, like those of many other states, reflect sharp variations between rich and poor communities. While Connecticut as a whole has consistently been one of the most affluent states,⁵³ its wealth is heavily concentrated in its suburban communities. Many of the state's more rural areas and its major urban centers (particularly Hartford, New Haven, and Bridgeport) contain populations that are dramatically poorer⁵⁴—and in the case of the cities, dramatically different in their racial composition as well.⁵⁵ Cities and towns also have significant variations in the value of their taxable property bases,⁵⁶ although these variations often do not correlate perfectly with the

implement this principle by appropriate legislation." This provision was added to the state constitution by a 1965 constitutional convention. See *Horton I*, 376 A.2d at 376-77 (Bogdanski, J., concurring).

53. In 1980, Connecticut's per capita income ranked it second among the states (after Alaska). In both 1990 and 2000, Connecticut ranked first. U.S. BUREAU OF ECON. ANALYSIS, SURVEY OF CURRENT BUSINESS (2001).

54. For example, in 1970, when the statewide per capita income was \$3900, see 1970 U.S. Census, Vol.9, Table 57, the per capita incomes in Bridgeport, New Haven, and Hartford were, respectively, \$3233, \$3181, and \$3113, while incomes in the wealthy suburbs of Greenwich and Westport were \$7833 and \$7102. See *id.*, Tables 89, 107. In 2000, the statewide per capita income was \$28,766, whereas the per capita incomes in Bridgeport, New Haven and Hartford had only grown to \$16,306, \$16,393, and \$13,428 respectively, and those in Greenwich and Westport had risen to \$74,346 and \$73,664. See U.S. Census Bureau, Census 2000 Summary File 3. In 1970, poor rural areas often had per capita incomes even below those of the urban centers, see 1970 U.S. Census, Vol. 8, Table 118 (listing per capita incomes for, e.g., Canterbury and Griswold of \$2954 and \$2944), whereas by 2000, these rural areas were doing substantially better than the cities, although still less well than the state median. See U.S. Census Bureau, Census 2000 Summary File 3 (listing Canterbury at \$22,317 and Griswold at \$21,196). See also Carole Bass, *A Whiter Shade of Sheff? The New Face of Connecticut School Reform*, HARTFORD ADVOCATE, Apr. 30, 1998 (describing continuing gap between low welfare populations in most of the state and high welfare rates in a handful of communities).

55. See *Sheff v. O'Neill*, 678 A.2d 1267, 1272-73 (Conn. 1996) (documenting stark disparities in minority school enrollment percentages between Hartford (92.4%) and neighboring communities (typically below 10%)). In 1970, Connecticut's total population was 93.5% white, whereas Hartford, New Haven and Bridgeport were, respectively, 70.8%, 72.6% and 82.7% white. See 1970 U.S. Census, Vol. 8, Tables 18, 23. By 2000, the statewide population was 81.6% white, the percentages for Hartford, New Haven and Bridgeport had dropped to 17.8%, 35.6% and 30.9%. See U.S. Census Bureau, Census 2000 Redistricting Data (Public Law 94-171) Summary File. Whereas the non-white population was almost entirely African-American in 1970, see 1970 U.S. Census, Vol. 8, Table 18, by 2000 it was made up of roughly equal percentages of Latinos (9.4% of state population) and blacks (9.1%), with a smaller representation (2.4%) of Asian-Americans. See U.S. Census Bureau, Census 2000 Redistricting Data (Public Law 94-171) Summary File.

56. See *Horton I*, 376 A.2d at 366-67 (describing 1972-73 property wealth per pupil ranging

differences in incomes of their residents.⁵⁷ In Connecticut (like many of its New England neighbors, but unlike much of the rest of the country), each city or town constitutes its own school district.⁵⁸ Thus, the economic and racial divisions among the municipalities are reflected in the disparities among school systems as well.

The *Horton* case was brought on behalf of students in the town of Canton, a community located some ten miles outside of Hartford with a 1970 population of less than 7000.⁵⁹ Although not one of the state's poorest communities, Canton's taxable property wealth of \$38,415 per pupil in 1972-73 was substantially below the state average of \$53,639, and dramatically below the \$100,000 range characteristic of the wealthiest school districts.⁶⁰ In this period, the state of Connecticut provided only a relatively meager twenty to twenty-five percent of school funding (far below the then national average of forty-one percent), and, unlike most other states which distributed a significant share of their funds under formulae designed to mitigate differences in local district wealth, Connecticut allocated the vast bulk of state funds through flat per-pupil grants.⁶¹

As a result, Connecticut presented a relatively stark version of the characteristic pattern challenged in all of the school funding cases: the poorer districts, while taxing themselves more heavily, were able to provide significantly less funding for their schools than were their wealthier neighbors.⁶² Canton provided a clear, though not an extreme, example. Its school tax rate of 21.9 mills compared to a state average of 14.6 mills, and to a typical rate of 11.1 mills for the wealthiest communities, while its per pupil spending of \$945 fell

from \$170,000 in wealthy communities to \$20,000 in poor districts).

57. See Churgin et al., *supra* note 38, at 1327-28 (calculating the weak correlations between poverty levels and low property values, chiefly due to high commercial valuations in communities where the poor reside).

58. See CONN. GEN. STAT. § 10-240 (2002).

59. See 1970 U.S. Census, Conn. 8-116, Table 31 (listing Canton's population as 6,868, more than ninety-nine percent white). By 2000, Canton's population had grown to 8840, ninety-six percent of which was white. 2000 U.S. Census, Canton data, Table DP-1, <http://factfinder.census.gov>.

60. See *Horton I*, 376 A.2d at 366-67. At the same time, Canton was substantially better endowed than the poorest communities, with per pupil valuations in the \$25,000 range. *Id.* Measured by income, rather than by wealth, Canton in 1970 was almost precisely at the state median. Compare 1970 U.S. Census, Conn. 8-175, Table 57 (Conn. average family income of \$13,795), with Conn. 8-116, Table 118 (Canton average family income of \$14,022). By 2000, Canton's household incomes had moved significantly above the statewide figures. Compare 2000 U.S. Census, Conn. data, Table DP-3, <http://factfinder.census.gov> (Conn. median family income of \$65,521), with Canton data, Table DP-1, <http://factfinder.census.gov> (Canton median family income of \$80,553).

61. *Horton I*, 376 A.2d at 366. Connecticut's approach to distribution of state aid ranked it last among all the states in terms of its equalizing effects. See *id.* at 368.

62. *Id.* at 367.

substantially short of the statewide average of \$1055, and dramatically short of the \$1245 typically spent in the wealthiest districts.⁶³ These spending differences translated into significant differences in the abilities of the school systems to provide educational opportunities to their students, differences which the courts quantified in terms of sharply differential spending, inter alia, on teacher salaries, and on special education services.⁶⁴

Faced with the clear evidence of these sharp disparities, the *Horton* trial court ruled, in late 1974, that Connecticut's school funding system violated the state constitution.⁶⁵ The state's supreme court affirmed this decision in 1977 by a four-to-one margin.⁶⁶ The supreme court reasoned that, under the state constitution, even if not under the Federal Constitution, "the right to education is so basic and fundamental that any infringement of that right must be strictly scrutinized."⁶⁷ Because the right to education is fundamental, it follows that "pupils in the public schools are entitled to the equal enjoyment of that right," and, hence, that the existing funding system, with its clear pattern of inequalities, "cannot pass the test of 'strict judicial scrutiny' as to its constitutionality."⁶⁸ The court did not spell out the extent to which its conclusion rested on the state constitution's specific mandate for free public schools, as opposed to its general guarantees of equal protection. Whatever the precise source, it found within the state constitution a "requirement that the state provide a substantially equal educational opportunity" to children in all of the state's public schools, regardless of the resources of the communities in which those schools may be located.⁶⁹

The court then concluded its opinion with a relatively brief but careful discussion of remedies. Like virtually every other court to find a state's school funding system unconstitutional, the Connecticut court placed the primary responsibility for designing a constitutional system on the legislature, observing that this allocation was particularly appropriate where the state constitution expressly assigned the legislature the responsibility for implementing the state's

63. *Id.* at 367-68. Again, Canton's situation was considerably less bleak than that of the state's poorest communities, where the average school tax rate was 26.3 mills, and the average spending was only \$813 per pupil. *Id.* at 368.

64. *Id.*

65. *Horton v. Meskill*, 332 A.2d 113 (Conn. Super. Ct. 1974).

66. *Horton I*, 376 A.2d at 359.

67. *Id.* at 373. In reaching this conclusion, the court drew support, not only from Connecticut's long history of state oversight of public education, *id.* at 373-74, and from the different functions and texts of the state and federal constitutions, *see id.* at 372 (noting the extent to which the *Rodriguez* decision rested on federalism concerns), but also from Justice Marshall's dissent in *Rodriguez* and from the school funding decisions in California and New Jersey, *id.* at 373, although, as the dissent pointed out, *id.* at 379 (Loiselle, J., dissenting), the majority was far from clear about the precise reasoning that it extracted or relied upon from these cases.

68. *Id.* at 374-75.

69. *Id.* at 375.

educational duties.⁷⁰ Nonetheless, the court proceeded to offer the legislature some broad suggestions about how to proceed. First, it referenced a number of remedial approaches adopted in other states, specifically characterizing them as "means of achieving substantial equality of opportunities for learning,"⁷¹ and thereby hinting strongly that any of them would suffice to meet the court's constitutional standard.⁷² Second, it expressly endorsed the trial court's findings that a constitutional solution need neither abandon the use of the property tax as a source of income for education funding nor diminish the extent of local control of education.⁷³ Finally, the court emphasized that the constitutional requirement was only for "substantial equality,"⁷⁴ and specifically that "absolute equality or precisely equal advantages are not required and cannot be attained except in the most relative sense."⁷⁵ Whatever the precise meaning of this somewhat bizarre turn of phrase, the court went on to spell out that deviations from perfect equality could be justified by a wide range of factors, including "economic and educational factors" affecting education costs, "course offerings of special interest in diverse communities," imperfect correlations between "dollar input and quality of educational opportunity," "individual and group differences," and "local conditions."⁷⁶ The list was long enough, and varied enough, to offer the legislature a wide range of latitude in which to devise a remedial strategy.

In light of the less than prompt responses to *Brown v. Board of Education*'s call for desegregation "with all deliberate speed,"⁷⁷ it seems more than a bit ironic that the Connecticut court, more than twenty years later, adopted that same phrase (without acknowledgment of either the source or the irony) to characterize the state's obligation to develop a constitutional system of education financing.⁷⁸ In fact, however, the political branches in Connecticut proved far more responsive to the constitutional flaws in the state's education funding system, than were the southern states to the unconstitutionality of segregation.

Indeed, it is noteworthy that, even before the suit was brought or decided, the legislature and executive had taken some initial steps to acknowledge and address the problems of school funding inequality. In 1972, a Governor's Commission on Tax Reform issued a report on local government, schools, and the property tax, which highlighted the "dual inequity" of higher taxes and lower spending in

70. *Id.* (citing CONN. CONST. art. VIII, § 1 ("There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation.")).

71. *Id.*

72. *Id.* at 375 & n.15.

73. *Id.* at 375-76. This passage echoes the opinion's earlier recitation of the trial court's specific findings concerning the flexibility of potential remedies. *See id.* at 369.

74. The standard of "substantial" equality is restated at least three times in the closing paragraphs of the decision. *See id.* at 375-76.

75. *Id.* at 376.

76. *Id.*

77. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

78. *Horton I*, 376 A.2d at 361.

the poorer towns and noted the proliferation of constitutional challenges to property-tax based funding systems across the nation.⁷⁹ In 1973, the legislature established a Commission to Study School Finance and Equal Educational Opportunity, which concluded that the existing financing system was “inherently inequitable” and proposed a specific reform program to the legislature.⁸⁰ After the trial court’s 1974 decision in *Horton* finding the current funding system unconstitutional, the legislature promptly responded with a modest package of reforms, increasing the size of the state’s uniform per-student grants from \$215 to \$250 and establishing a new, lottery-funded program of “educational equalization grants.”⁸¹ This latter program marked the first use in Connecticut of a “guaranteed tax base” formula, which allocated state aid in inverse relation to property wealth and district per capita income.⁸² The program was so modest in size and so constrained in its methodology that it, in fact, did little more than to provide per-pupil grants of a few additional dollars to all but the wealthiest districts.⁸³ However, its approach would prove a model for subsequent, more serious reforms. Although both the trial court and the state supreme court were quick to find these measures constitutionally insufficient, it appears (judging from the frequency with which they are cited in the courts’ opinions) that these first, tentative steps by the political branches reinforced the resolve of the Connecticut judiciary to tackle these challenging issues, both by underwriting the courts’ findings of severe and problematic inequalities and by signaling a legislative readiness to respond to a judicial mandate.

Indeed, once the state supreme court issued its *Horton I* ruling in 1977, the response was reasonably swift and substantial. In 1979, the legislature enacted a sweeping reform of Connecticut’s education funding system, with two principal components. The first element established a per-pupil minimum expenditure requirement for all districts, benchmarked at the current spending level in relatively high-spending districts.⁸⁴ The second element, the guaranteed tax base

79. See *Horton v. Meskill*, 332 A.2d 113, 114-15, 117 (Conn. Super. Ct. 1974) (citing and quoting 2 Report of Governor’s Commission on Tax Reform (Dec. 1972)); *Horton I*, 376 A.2d at 367.

80. *Horton I*, 376 A.2d at 376.

81. *Id.* at 369.

82. See *id.* at 369 & n.11. Connecticut’s “guaranteed tax base” approach is a variant of the “power equalization” approaches, which were widely advocated and not infrequently adopted around the country as the most effective remedy to school funding inequities.

83. For a discussion of its detailed workings, see *id.* at 369 n.11. The key constraint on the methodology was a cap on the funding provided to any district, which had the effect of providing identical per-pupil grants (ranging from \$12.50 to \$15 in different years) to virtually every district with property wealth below the top fifteen percent of districts.

84. See *Horton III*, 486 A.2d 1099, 1101 & n.3 (Conn. 1985). The minimum expenditure requirement was pegged at the spending level of the school district at the seventy-fifth percentile of students, ranked by spending per pupil. In calculating the required spending, additional funding of one-half the per-pupil amount was specified for each poor child (those receiving welfare assistance) in the district’s schools.

(GTB) grant formula, transformed the way in which the state provided financial support to its school districts.

The GTB formula, an outgrowth of the 1974 equalization grant approach, shifted Connecticut from its former program of uniform per-pupil grants to a version of the "power equalization" methodology advocated nationally by school finance reformers as the best way to equalize educational opportunity while respecting local autonomy.⁸⁵ Such power equalization methods were prominent among the approaches referenced in *Horton I*'s litany of effective remedies adopted in other jurisdictions.⁸⁶ Under a power equalization approach, each district determines its own level of local property tax effort, and the state then provides each relatively poor district with the additional revenue that its chosen tax rate would have yielded if its property wealth had equaled some higher statewide standard. Thus, each district retains the power to determine its own level of tax support for its schools (consistent with satisfying the minimum expenditure requirement), but the resources that the district has available to spend are determined not by its property wealth, but only by its chosen tax rate.

In Connecticut's GTB version of power equalization, each district was allocated state aid measured by comparing it to one of the wealthiest districts in the state, using a measure of wealth that reflected both property values and per capita incomes, with a further adjustment to reflect the greater costs of educating very poor children (again identified as those who were receiving welfare).⁸⁷ At the same time, in a nod to the interests of the wealthier districts, the legislation guaranteed that each district would continue to receive state assistance at least equal to what it had received under the prior flat per-pupil grant system. In light of the high costs of the new program, the 1979 legislation proposed to phase in both the minimum expenditure requirement and the full-funding of the GTB grants over a five-year period, with full implementation scheduled for the 1983-84 school year.⁸⁸ However, over the next few years, fiscal pressures led the legislature to repeatedly modify various features of the program, delaying full phase-in of the GTB by two additional years and adjusting its formulae to reduce its costs.

The effects of these reforms were significant, although less dramatic than their proponents must have hoped. The share of education costs borne by the state rose sharply, and the local share dropped commensurately. Whereas the state covered only 29.8% of school costs in 1978, its share had risen to 42.9% by 1984 and continued to grow in the ensuing years.⁸⁹ The disparities between

85. For further background concerning the power equalization approach and its history, see Enrich, *supra* note 1, at 111 & nn.41-42.

86. See *Horton I*, 376 A.2d at 375 & n.15; see also *id.* at 372 n.12 (noting that, in the years after *Rodriguez*, eleven states had enacted some type of power equalizing formula).

87. For more of the details, see *Horton III*, 486 A.2d at 1101-02 & n.2.

88. *Id.* at 1107. Full funding of the program was estimated to require \$443 million annually by the time of full implementation. See *id.* at 1104 n.7.

89. *Id.* at 1108 n.17. The ensuing years up to 1989-90 show continuing growth in the state's share. See Conn. Gen. Assembly, Office of Fiscal Analysis website, at <http://www.cga.state>.

spending in the wealthier and poorer districts diminished, although they remained substantial. In 1973-74, the school district at the ninety-fifth percentile of per-pupil expenditures spent 86.9% more than the district at the fifth percentile, but by 1983-84 the disparity had declined to 70.1%.⁹⁰

The *Horton* plaintiffs did not initially challenge the constitutionality of the 1979 reforms, but, when the legislature in 1980 began to back away from full and prompt implementation,⁹¹ the plaintiffs returned to court for a determination of whether the modified reform package satisfied the constitutional requirements. The trial court found that the 1979 legislation would have been constitutionally adequate but that a number of the subsequent modifications could not survive the court's strict scrutiny; the court ordered implementation of the program stripped of these unconstitutional adjustments.

On appeal, the state supreme court chose a more measured approach. In an opinion authored by Chief Justice Ellen Peters, the supreme court approved the trial court's endorsement of the 1979 reforms, but declined to decide the constitutionality of the subsequent amendments. Instead, the court focused on the standards that should be applied in assessing whether school financing legislation survived strict judicial scrutiny and remanded the case to the trial court for assessment of the post-1979 amendments under its newly announced standards. Drawing on its recognition in *Horton I* of the "sui generis" character of school financing challenges, the court concluded that the "compelling state interest" standard that it ordinarily deployed in strict-scrutiny contexts was too rigid for school funding cases.⁹² Instead, it proclaimed a new three-step standard, modeled on the federal courts' approach in equal protection challenges to

ct.us/ofa/documents/MajorIssues/2001/PublicElementarySecondaryEducationExpendituresConnecticut.htm (last visited Jan. 20, 2003) (using a slightly different metric but showing growth in state share from 37.74% in 1983-84 to 45.52% in 1989-90).

90. *Horton III*, 486 A.2d at 1108 & n.16. While the court concluded from these statistics that the legislation had narrowed the gaps in funding capacity "significantly," a closer examination of the data, *see id.* at 1107 n.15, reveals that the gap had been substantially less than 87% in all but one of the years between 1973-74 and the enactment of the reform legislation, and had shown no further improvement after the first year of the GTB program's introduction. Other statistical measures of changes in the disparities showed even less impressive results. For example, the ratio of spending between the highest and lowest spending school districts, after dipping slightly in the first few years of the GTB program, had grown back to its pre-GTB levels by 1983-84. *See also* Reed, *supra* note 18, at 191-92 (measuring the modest gains in equality of resources achieved in Conn. in the years after 1977). The end of this section of this Article contains a discussion of subsequent trends in these statistics.

91. Indeed, by one measure, the backsliding in the early 1980s wiped out all of the progress toward equalization that had been achieved in the late 1970s, although further progress was achieved in the following years. *See* Reed, *supra* note 18, at 192.

92. *Horton III*, 486 A.2d at 1105. While borrowing the "sui generis" label from *Horton I*, the *Horton III* court makes no attempt to build on, or even to reference, *Horton I*'s discussion of why school finance cases are so different from other equal protection challenges, nor to explain why these differences call for a different methodology for strict scrutiny.

legislative reapportionment plans. In essence, if a financing plan (a) results in “more than de minimis” disparities in educational expenditures, the disparities must be shown (b) to result from “advancement of a legitimate state policy” and (c) to not be so large as “to emasculate the goal of substantial equality.”⁹³

Having articulated this new standard, the court deployed it with evident political sensitivity.⁹⁴ With regard to the 1979 legislation, the court concluded that the trial court’s analysis, while grounded on a different standard, sufficed to establish constitutionality, although the supreme court’s discussion of the third prong of its test (whether the remaining disparities are too great) was palpably strained by the fact that the trial court had not addressed this issue. In turning to the post-1979 amendments, rather than attempting to apply its new standard, the court simply remanded the issues to the trial court with no suggestion about the outcome. The evident strategy was to maintain pressure for continued reform without directly confronting the legislature. The overall message—to the parties, to the trial court and to the political branches—was that valuable progress had been made, but that the courts had to continue to oversee the process, under a standard that sought to balance flexibility with a continued commitment to the goal of substantial equality of opportunity.

The next significant move came from the legislature, which, in 1988, again completely overhauled the state’s approach to education financing, replacing the GTB formula with a new “Educational Cost Sharing” (ECS) methodology. This new system abandoned the GTB’s power equalization approach, with its objective of placing all districts on an equal footing in their ability to provide funding for education, in favor of a foundation funding system, which instead focuses on ensuring that each district has the resources to provide an adequate educational opportunity to its students.⁹⁵ At the heart of the ECS formula is the identification of a foundation cost, representing the minimum amount needed to provide an adequate education for a typical student.⁹⁶ The 1988 plan set the foundation cost at a specified dollar figure but called for annual adjustments to peg the foundation to the spending levels of a relatively high-spending district in a recent year. The foundation cost is then multiplied by a district’s student population (with additional weights for poor students as well as for those with limited English proficiency or with low scores on state tests) to determine the foundation budget for the district. The district’s ECS grant from the state is then calculated as a percentage of the foundation budget, with the percentage set to reflect the relative abilities of different districts to cover education costs from

93. *Horton III*, 486 A.2d at 1106-07.

94. See Hon. Ellen A. Peters, *Getting Away from the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543, 1563-64 (1997) (describing “political digestibility” as a key benchmark for judicial approaches to issues raising separation-of-powers concerns).

95. For a general discussion of foundation funding approaches, see Enrich, *supra* note 1, at 112.

96. For details of the Connecticut ECS system, see Conn. General Assembly, Legislative Program Review and Investigations Comm., *Connecticut’s Public School Finance System 3-11* (2001) [hereinafter LPR & IC Report].

local property taxes. In particular, this “base aid ratio” is calculated by comparing the wealth of each district (measured by its property wealth, household income, and several other factors) to a “guaranteed wealth level,” which was initially set at twice the wealth of the median town. As with the former GTB system, the ECS approach also included a minimum expenditure requirement for each district, in addition to provisions that provide some continuing assistance to even the wealthiest districts.

By setting a relatively generous foundation level and a relatively high guaranteed wealth level, the ECS formula continued to have a substantial equalizing effect on Connecticut’s school districts. By 1991-92, the school district at the ninety-fifth percentile of spending per student was only spending forty-nine percent more than the district at the fifth percentile, compared to an eighty-seven percent disparity on the eve of the initial *Horton* decision.⁹⁷ In its early years, the ECS system appears to have satisfied the proponents of funding equity, at least well enough to forestall further litigation challenging funding equity. Yet, as was the case with the GTB approach, subsequent legislative adjustments (to which we will return below) have significantly undermined the ECS formula’s equalizing power and have allowed funding gaps to widen again in recent years, inviting new *Horton*-based legal challenges.⁹⁸

So, how successful was the response to *Horton*? The two major waves of legislative reform unquestionably resulted in a substantially increased state role in school financing—and in a commensurately decreased reliance on local property taxes—and the state funds were allocated under formulae that significantly reduced the gaps between rich and poor districts (unlike the pre-*Horton* per pupil allocations). At the same time, each of the reform efforts was sharply scaled back by subsequent legislative adjustments, and the spending disparities between high-spending and low-spending districts have remained sizeable. Indeed, in a number of other states, courts have taken the opposite path from *Horton III* and have found that similar reforms, which allowed patterns of persisting but diminished disparities, failed to satisfy constitutional demands.⁹⁹ The Connecticut court chose a different course, granting constitutional approval to limited reforms while attempting to maintain judicial pressure for continued efforts. However, it is interesting to note that, by a decade after *Horton III*, Chief Justice Peters, its author, was recharacterizing the court’s cautious decision as if it had taken the bolder step of finding the scaled-back reforms unconstitutional.¹⁰⁰

97. Author’s calculations from data provided by the Connecticut Department of Education.

98. See *infra* Part IV.

99. See, e.g., *Abbott v. Burke*, 643 A.2d 575 (N.J. 1994); *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997); *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491 (Tex. 1991).

100. See *Sheff v. O’Neill*, 678 A.2d 1267, 1277 (Conn. 1996) (describing *Horton III* as “requiring further remedial action”); *id.* at 1288 (describing *Horton I* as finding fiscal disparities “constitutionally unacceptable”).

III. *SHEFF V. O'NEILL*: CONNECTICUT TACKLES RACIAL ISOLATION

Whatever the conclusion about *Horton*'s efficacy, one thing is clear: the *Horton* case was never intended nor expected to address the problems of Connecticut's large urban school districts attended by the preponderance of the state's poor minority students. Indeed, even before the *Horton* suit was filed, a widely cited Note in the *Yale Law Journal* documented that, at least in Connecticut, the urban districts with the poorest students were often not the districts with the least property wealth, nor with the least funding for education.¹⁰¹ Throughout the 1970s and 1980s, average per pupil spending in the state's urban centers hovered around the statewide average, and per pupil spending in Hartford in particular was consistently well above the state norm.¹⁰² The funding reforms enacted in response to *Horton* were designed to give special attention and financial support to districts with disproportionate numbers of low-income students or others at risk of academic failure and in need of extra services, thereby further strengthening the relative financial positions of the state's urban districts.¹⁰³ Unequal funding was not the primary issue for these schools.

Nonetheless, the state's urban schools faced profound problems, problems typical of those found in cities across the country serving predominantly poor and largely minority student populations. In the schools of the state's three largest cities—Hartford, New Haven, and Bridgeport—performance on state standardized tests was abysmal, and starkly worse than performance in other districts.¹⁰⁴ Dropout rates were likewise troubling and dramatically out of line with statewide levels.¹⁰⁵ The disparities and failings were so stark that Governor

101. Churgin et al., *supra* note 38. The Note played a central role in Justice Powell's dissection of the wealth-as-a-suspect-class argument in *Rodriguez*. See 411 U.S. at 22-24. For other cases citing the Note, see *Lujan v. Colorado State Board of Education* 649 P.2d 1005, 1021 (Colo. 1982); *Horton I*, 376 A.2d at 361; and *Robinson v. Cahill*, 355 A.2d 129, 185 (N.J. 1976).

102. Author's calculations from data provided by Connecticut State Department of Education. For example, in 1977-78, statewide average spending was \$1670 per pupil, while spending in the urban centers (the communities that were subsequently classified by the State Department of Education into Education Reference Group ("ERG") I, a classification reflecting socioeconomic status) averaged \$1793 and Hartford spent \$2100. By 1986-87, the respective numbers were \$4521 statewide, \$4527 in ERG I, and \$4983 in Hartford. In fact, in many of these years, Hartford's per pupil spending was above the average for ERG A, the wealthiest and highest spending grouping of suburban communities.

103. *Sheff*, 678 A.2d at 1277.

104. *Id.* at 1273. In 1993-94, less than 4% of eighth-grade students in the urban districts achieved passing scores on the three statewide mastery exams, as contrasted to 22.4% statewide, and to more than half of students in the top socioeconomic cluster. See Strategic School District Profiles, available at <http://www.csde.state.ct.us/public/der/ssp/index.htm> (last visited Apr. 25, 2003).

105. In 1993-94, Bridgeport, Hartford, and New Haven reported dropout rates of 10%, 16%, and 8% respectively, as contrasted with a statewide rate of 4.8%. Not surprisingly, in ERG A (the

Weicker focused on them in his 1993 State of the State Message, observing that "there are two Connecticut when it comes to the education of our children, Connecticut separated by racial and economic divisions. There is a Connecticut of promise, as seen in its suburbs, and a Connecticut of despair as seen in its poverty-stricken cities."¹⁰⁶ The children attending these failing urban schools were, as Governor Weicker observed, predominantly poor; in 1993-94, more than seventy percent of them were eligible for free or reduced-price school meals.¹⁰⁷ They were also overwhelmingly students of color; in 1993-94, eighty-five percent of New Haven's, eighty-eight percent of Bridgeport's, and ninety-four percent of Hartford's school populations were minority group members, predominantly Latino and African-American.¹⁰⁸ These economically and racially isolated populations confronted Connecticut's urban school districts with challenges that they could not meet,¹⁰⁹ notwithstanding the financial resources with which the districts were provided.

This bleak pattern repeats itself in urban schools in many parts of the country, and in a number of states, parties have sought to use school funding litigation to address it.¹¹⁰ In Connecticut, however, where the successful *Horton* case had left the urban schools' problems largely untouched, a novel litigation strategy arose when *Sheff v. O'Neill* was filed in 1989 on behalf of a group of students in the Hartford area.¹¹¹ Instead of focusing on the adequacy or equity of the resources provided to Hartford's schools in comparison to those of its neighbors, the *Sheff* plaintiffs directly challenged the racial and economic isolation of Hartford's school children, arguing that this de facto segregation deprived them of their rights under Connecticut's constitution. For Hartford's poor and minority children, the earlier shift from race-based lawsuits to money-based suits had proved of no value. Consequently, in *Sheff*, they chose to give

top socioeconomic tier) dropout rates were consistently below one percent. See Strategic School District Profiles, *supra* note 104.

106. *Sheff v. O'Neill*, 1995 WL 230992, at *20 (Conn. Super. Ct. Apr. 12, 1995) (quoting Governor Lowell P. Weicker, State of the State Message for Connecticut (Jan. 6, 1993)).

107. See Strategic School District Profiles, *supra* note 104. This contrasts to a statewide average of 23.5%. See also *Sheff*, 1995 WL 230992, at *6 (citing evidence in a 1988 report that Hartford, New Haven, and Bridgeport respectively ranked second, sixth and eighth among cities nationally with the highest child poverty rates).

108. See Strategic School District Profiles, *supra* note 104.

109. The *Sheff* court catalogues some of the familiar challenges: a high proportion of children from single-parent homes, a high proportion of children who are not native speakers of English, and a low proportion of students who continue to attend the same school from one year to the next. See *Scheff*, 678 A.2d at 1273.

110. See, e.g., Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661 (N.Y. 1995); DeRolph v. State, 677 N.E.2d 733 (Ohio 1997); Abbott v. Burke, 643 A.2d 575 (N.J. 1994).

111. Plaintiffs included both white and minority students in the Hartford schools, as well as two white students from the neighboring suburban West Hartford schools. The central claim was that segregation of the school systems worked a constitutional deprivation on both white and minority students in both privileged and underprivileged districts. *Sheff*, 678 A.2d at 1271-72.

race-based claims another try.

This strategy was encouraged by at least two considerations. First was the simple fact of the stark disparities between the academic experiences and outcomes of children in the Hartford schools and those of students in the surrounding suburbs, disparities which appeared to make a compelling case for a denial of the "substantially equal educational opportunity" that *Horton* had found was the constitutional right of all Connecticut children.¹¹² After all, nothing in the *Horton* rulings had suggested that equality of *funding* was all that the constitution required, and the contrasts between educational opportunities in the Hartford and suburban schools offered powerful evidence that, regardless of arguable funding parity, nothing like equality of educational opportunity had been achieved.

The second factor encouraging the *Sheff* approach was the distinctive wording of the Connecticut Constitution's equal protection provision, which since 1965 had provided that "[n]o person shall be denied the equal protection of the law *nor be subjected to segregation or discrimination* in the exercise or enjoyment of his civil or political rights because of religion, race, color, ancestry or national origin."¹¹³ The Connecticut Constitution's explicit prohibition against segregation provided a clear difference from the Federal Equal Protection Clause, a difference that invited a construction broader than the focus on *de jure* segregation that had limited the reach of the federal clause.

Reflecting these two foundations, the *Sheff* complaint focused on two distinct claims.¹¹⁴ First, it asserted that the extreme racial and economic isolation of Hartford's student population, contrasted against the sharply different composition of the neighboring school districts, constituted *de facto* segregation, and that such *de facto* segregation, at least in the context of the fundamental right to an education, constituted a *per se* violation of the Connecticut Equal Protection and Anti-Segregation Clause, regardless of the nature or extent of any variations in the quality of the education delivered in the segregated schools. Second, it claimed that, due to its racial and economic isolation and the insufficiency of its resources, the Hartford school district was failing to provide educational opportunities to its students that were substantially equal to those provided in other districts, as was required under the state constitution's education and equal protection clauses. The first of these claims depended on few facts beyond the simple reality of racial isolation, whereas the second depended on a factual showing of the educational shortcomings of the Hartford school district that resulted from its racial and economic isolation.¹¹⁵

112. *Horton I*, 376 A.2d 359, 376 (Conn. 1977).

113. CONN. CONST. art. I, § 20 (amended 1974 & 1984) (emphasis added). Subsequent amendments added sex and physical or mental disability to the list of impermissible bases for segregation or discrimination. See *Sheff*, 678 A.2d at 1282 (noting that only a handful of other state constitutions contained any similar express prohibition against segregation).

114. For a careful explication of the *Sheff* complaint, see 678 A.2d at 1299-1303 (Borden, J., dissenting).

115. The complaint encompassed two other counts as well, one asserting a failure of the

After six years of procedural wrangling and development of a substantial factual record, the trial court held in favor of the defendants, on the ground that the plaintiffs had failed to establish the requisite state action causing the alleged harms. Indeed, the trial court devoted much of its lengthy opinion to a discussion of the numerous ways in which the state had taken notice of and acted to remedy the problems that arose from the isolation and poverty of the urban districts.¹¹⁶ After remanding the case to the trial court for development of complete findings of fact, the state supreme court reversed in a four-to-three decision again authored by Chief Justice Peters.¹¹⁷ The court concluded that, in light of the state's affirmative constitutional obligation to provide an equal educational opportunity for all the state's children, a causal connection to specific state action was not a precondition for judicial scrutiny of the alleged constitutional deprivations suffered by the plaintiff students.¹¹⁸ The court then proceeded to the merits of the constitutional claims (which the trial court had never reached) and found in favor of the plaintiffs.

The court rested its decision on a murky blend of the plaintiffs' two main claims, concluding that "the existence of extreme racial and ethnic isolation in the public school system deprives schoolchildren of a substantially equal educational opportunity."¹¹⁹ The court was careful not to accept plaintiffs' argument that racial segregation, even de facto segregation, constituted a per se constitutional violation, presumably out of concern both for the potentially sweeping precedential effect of such a ruling and for the weak support for such a claim in the constitutional text. At the same time, it avoided the need to rely on factual findings about the inferior quality of the education delivered to Hartford students. Instead, the court focused on the direct "educational impairment" that, in fact, resulted from the segregation prevalent in the Hartford-area schools, particularly the lost educational opportunities from lack of interactions across racial and ethnic lines. The court held that this impairment constituted a violation of the students' constitutional rights, as defined jointly by the education and anti-segregation clauses.¹²⁰

The result of this approach is an opinion that often seems oddly evasive. The court spent far more time and energy explaining why discriminatory intent and

Hartford schools to provide a minimally adequate education and the other asserting a violation of the state constitution's due process guarantees. *See Sheff* 678 A.2d at 1271-72. However, the primary focus of the litigation was on the first two counts.

116. *Sheff v. O'Neill*, 1995 WL 230992, at *10-*30 (Conn. Super. Ct. 1995).

117. 678 A.2d at 1271.

118. *Id.* at 1277.

119. *Id.* at 1281. *See id.* at 1286 (noting that the court's reasoning combined two of the plaintiffs' claims).

120. *Id.* at 1282-83. James Ryan has argued that the court could have reached its anti-segregation decision based on the education clause alone, given a proper factual showing. James E. Ryan, *Sheff, Segregation, and School Finance Litigation*, 74 N.Y.U. L. REV. 529, 541-42 (1999). This may well be true as a general statement, but the specific factual findings by the *Sheff* trial court made it less than a promising case for such a strategy.

explicit state action were unnecessary than it did in explicating the actual constitutional harm suffered by the plaintiff school children.¹²¹ Although the court spoke at several points of the “devastating effects,”¹²² the “negative consequences,”¹²³ and the “substantial[] impair[ment]” of educational opportunities¹²⁴ that result from racial and ethnic isolation, the court had little to say about the actual nature of these harms. In particular, the court declined to rely in any way upon the starkly inferior academic performance of Hartford’s students, on the differences in educational opportunities offered in the urban and suburban schools, or on the chasm between promise in the suburbs and despair in the cities observed by Governor Weicker. Instead, at the only point where the court tried to spell out the harmful effects of segregation, it focused exclusively on the impairment of the schools’ ability to inculcate the “shared values” of a multicultural society by bringing students of different backgrounds together.¹²⁵ For the most part, the court limited itself to repeated bare assertions of the harmfulness, wrongfulness, and unconstitutionality of segregation, coupled with reminders about the importance of education and the societal significance of deprivations of educational opportunity.

The explanation for this spare and conclusory treatment of what seems the central issue in the case can be found in the trial court’s framing of the issues for the appeal. Its findings of fact effectively precluded the supreme court from attributing the real and substantial inequalities of educational opportunity between urban and suburban districts to the racial and ethnic isolation that plaintiffs sought to challenge. In particular, the trial court found the following: (1) the dramatic differences in test scores proven in the case could not be used to draw meaningful interdistrict comparisons or to draw conclusions about the quality of education in the Hartford schools;¹²⁶ (2) the Hartford school system provided its students with equal educational opportunities because it received resources commensurate with those received by other districts; and (3) poverty, and not racial or ethnic isolation, was the principal causal factor behind the lower academic achievement levels in the urban schools.¹²⁷ In the face of these findings, the court, while convinced of the severe harms flowing from the racial, ethnic, and economic isolation of Hartford’s students, had a hard time articulating those harms. Disparities in resources were denied by the trial court, and disparities in achievement were attributed to poverty, not race, a factor that the court was unwilling to invoke as a trigger for its strict scrutiny.¹²⁸ Thus, the court was left to place the full weight of its ruling on the simple repugnance of segregation and its acknowledged impacts on opportunities for intercultural

121. See Ryan, *supra* note 120, at 543 (labeling the court’s analysis as “summary”).

122. *Sheff*, 678 A.2d at 1270.

123. *Id.* at 1273.

124. *Id.* at 1280. See also *id.* at 1282 (“educational impairment”).

125. *Id.* at 1285.

126. *Id.* at 1305 (Borden, J., dissenting).

127. *Id.* at 1274.

128. See *id.* at 1287.

learning.¹²⁹

This constrained analysis of the constitutional harms had important, if unstated, implications when the court turned to remedial questions. If the deprivation of equal educational opportunity resulted, not from the inferior education received by urban schoolchildren, but from the simple fact of their racial isolation, then a remedy must focus, not on improvement or equalization of educational opportunities, but on the elimination of segregation. In its brief discussion of remedies, the majority's opinion avoided any concrete suggestions about the substance of a constitutional approach. Instead, the court, expressly modeling its approach on *Horton I*, limited the initial judicial role to a declaration of unconstitutionality, instructing the trial court to retain jurisdiction while allowing the legislative and executive branches an opportunity to "search for appropriate remedial measures."¹³⁰ Unlike *Horton I*, however, the court offered no hints about the parameters of a constitutional remedy, no references to strategies adopted elsewhere that would satisfy the constitutional mandate, and no assurances about types of approaches that might suffice or about others that would not be necessary.¹³¹ This time, the court truly left the political branches to their own wisdom, urging them only to act with urgency.¹³²

The response, as with *Horton I*, was impressively swift. Within three weeks of the court's ruling, Governor Rowland appointed an Education Improvement Panel, whose mission was to respond to the *Sheff* decision and to come up with "a broad range of options for reducing racial isolation in [the] state's public schools" and for addressing other educational goals.¹³³ The Panel was chaired by the state's Commissioner of Education and included key legislative leaders and other educational policy makers, advocates, and experts.¹³⁴ Six months later, in early 1997, the Panel issued its final report, containing fifteen specific recommendations. By June 1997, less than a year after the *Sheff* ruling, the

129. See *id.* at 1285 (noting the parties' agreement "that racial and ethnic segregation is harmful").

130. *Id.* at 1290. Not long after authoring the opinion, Chief Justice Peters reflected that this deference served "in substantial part, to defuse resistance" to the court's controversial decision. See Peters, *supra* note 94, at 1559.

131. See *supra* notes 72-76 and accompanying text for a discussion of these aspects of *Horton I*'s remedial discussion.

132. *Sheff*, 678 A.2d at 1290.

133. Governor's Exec. Order No. 10 (July 25, 1996), reprinted in Education Improvement Panel, Report to the Governor and General Assembly (Jan. 22, 1997). While the Executive Order does not expressly limit the range of options to be considered by the Panel, it does express the Governor's goal of finding a solution "based on voluntary measures emphasizing local and parental decision making as opposed to state-imposed mandates such as 'forced bussing.'" While the *Sheff* ruling was the impetus behind the Panel's formation, the Governor's Order tied the goal of reducing racial isolation to three other, potentially competing goals: "improving teaching and learning, enhancing a sense of community and encouraging parental involvement."

134. See *Sheff v. O'Neill*, 733 A.2d 925, 927 (Conn. Super. Ct. 1999) (*Sheff II*) (describing composition of the panel).

Connecticut legislature enacted a series of measures based on the Panel's recommendations.¹³⁵

The speed of the response, however, may have been more impressive than its substance.¹³⁶ Many of the measures recommended by the Panel and adopted by the legislature—such as expansion of early childhood and adult education, increased funding for targeted programs, and a restructuring of the governance of the Hartford schools—were directed, not at responding to racial isolation, but at more generic issues of educational quality. In sharp contrast both to the *Sheff* opinion's focus on the state's districting as the primary source of the unconstitutional segregation¹³⁷ and to the *Sheff* plaintiffs' demand for a redrawing of the state's school district boundaries to eliminate racially segregated school systems,¹³⁸ the Panel and the legislature limited themselves to "voluntary" strategies for reducing racial imbalance. For example, the legislation subsidized and encouraged the creation of interdistrict magnet schools, with special programs designed to draw a diverse student body from a wide geographical area; substantially expanded, and increased state support for, an existing "open choice" program allowing students to elect to attend schools outside of their own districts; and authorized and funded interdistrict cooperative programs to bring urban and suburban students together for specific educational experiences, such as joint field trips, classroom exchanges, or inter-school visitations. The legislation also included other elements intended to assess and address racial and ethnic isolation, such as a minority staff recruitment program and a requirement that the state and all school districts establish plans for reducing racial, ethnic and economic isolation and monitor their progress in achieving their goals.

In essence, the state responded to *Sheff*'s mandate with a package of initiatives reflecting the current vogues in education reform—measures to expand preferred programs (such as technology and early reading), to enhance parental choice, and to increase district and school accountability.¹³⁹ In light of the

135. 2001 Conn. Acts 97-4 (Spec. Sess.); 1997 Conn. Acts 256 (Reg. Sess.); 1997 Conn. Acts 290 (Reg. Sess.). These legislative actions were supplemented by a number of others over the ensuing years, many of which are cited in the sources cited in the following footnote.

136. For discussions of the content of the legislation, see *Sheff II*, 733 A.2d at 927-937; Kathryn A. McDermott et al., *Have Connecticut's Desegregation Policies Produced Desegregation?*, 35 EQUITY & EXCELLENCE IN EDUC. 18 (2002); Judith Lohman & Alan Shepard, *Sheff vs. O'Neill Response—K-12 Programs* (Conn. Office of Legislative Research Report 2002-R-0107).

137. See *Sheff*, 678 A.2d at 1274.

138. See *id.* at 1328 (Borden, J., dissenting) (discussing remedies sought by plaintiffs); see also CONNECTICUT CENTER FOR SCHOOL CHANGE, THE UNEXAMINED REMEDY (1998) (offering a detailed blueprint for consolidation of the Hartford-area school districts into a single consolidated district to meet the *Sheff* mandate).

139. See *Sheff II*, 733 A.2d at 943 (describing state's response as "a comprehensive, interrelated, well funded set of programs and legislation designed to improve education for all children, with a special emphasis on urban children, while promoting diverse educational environments"); Lohman & Shepard, *supra* note 136, at 1 (dividing legislative response into "two

prevailing wisdom, these measures marshaled significant state resources in directions generally expected to positively impact educational outcomes. Some even promised to increase the mobility of students across district lines. Yet, none of these measures either altered district boundaries or imposed any requirements that would directly reduce racial, ethnic and economic isolation.

Disappointed by the absence of more aggressive remedies, the plaintiffs returned to court to challenge the adequacy of the legislative response. The trial court ruled on this challenge in March 1999, before many of the legislative measures had been fully implemented, and the court's ruling was not appealed.¹⁴⁰ The court, after an extended and enthusiastic recounting of the many programs and measures adopted in response to *Sheff I*, concluded that it was simply too early to seriously consider a claim that the state's remedial measures were insufficient, without giving them a chance to work.¹⁴¹ With regard to plaintiffs' argument that the types of measures adopted by the state were incapable of producing sufficiently rapid and substantial desegregation and that only a mandatory pupil reassignment plan would suffice, the court concluded, on the basis of an expert's testimony, that voluntary approaches were preferable to mandatory ones because they "promote integration of more lasting duration with a minimum of opposition and disruption."¹⁴²

Unfortunately, the passage of time has only confirmed the *Sheff* plaintiffs' fears that the state's remedies were unlikely to promote significant integration at all. In the intervening years, the legislature has continued to fine-tune the initiatives adopted in 1997 and has provided substantial resources for the programs.¹⁴³ Nonetheless, in each of Connecticut's three urban centers, the concentration of students of color in the schools was higher in 2000-01 than it had been in 1993-94.¹⁴⁴ A recently published comprehensive study of the desegregative effects of Connecticut's efforts concluded that, while the programs allowed several thousand students to attend schools outside their home communities, these measures had "almost no measurable effect on overall levels

major areas: (1) expanding interdistrict and voluntary school choice programs and (2) establishing programs aimed at improving student achievement, particularly in poor urban school districts").

140. *Sheff II*, 733 A.2d at 925.

141. *Id.* at 938.

142. *Id.* at 942. The expert Christine Rossell's testimony focused on the risks of "white flight" in response to mandatory reassignment plans. *Id.* at 940-41. The conclusion the judge derived from her testimony was that "in the area of school desegregation, slow and steady wins the race." *Id.* at 940.

143. See Lohman & Shepard, *supra* note 136.

144. Author's calculations from Conn. Dept. of Educ. district profiles. Hartford went from 93.8% minority students to 94.3%, New Haven from 84.7% to 88.7%, and Bridgeport from 87.6% to 87.9%. (2000-01 is the most current year for which such data are available.) In Hartford and Bridgeport, but not New Haven, the 2000-01 figures reflect an improvement of less than a percentage point over the comparable figures in 1996-97 (when Hartford was 95.2% minority, Bridgeport 88.7% and New Haven 87.3%).

of integration.”¹⁴⁵ In part, this disappointing result reflected the fact that many of the voluntary transfers actually decreased racial integration, rather than increasing it, as students transferred to schools where they would be less racially isolated.¹⁴⁶

While the *Sheff* remedies appear to have done little to remedy the *Sheff* wrongs, they have not been without their positive effects. The state has dedicated substantial resources (over \$160 million annually in recent years) to the programs enacted in response to *Sheff*, and much of that money has gone to Connecticut’s troubled urban districts.¹⁴⁷ In the post-*Sheff* years, per pupil spending in the urban districts, which had remained close to the state average in prior years, has risen substantially above the average,¹⁴⁸ and a recent national study identified Connecticut as one of the few states where per pupil spending in the highest poverty districts compared satisfactorily to spending in the lowest poverty districts, even allowing for the added costs of serving at-risk student populations.¹⁴⁹ Perhaps reflecting these infusions of resources, both performance on standardized tests and high-school dropout rates have shown significant improvement over recent years in Connecticut’s urban districts, although, on each of these measures, the cities’ performance remains starkly worse than that of their suburban neighbors.¹⁵⁰ The two separate worlds identified by Governor Weicker remain very much separate, and very different in the educational opportunities that they provide.

IV. SOME RECENT DEVELOPMENTS ON BOTH FRONTS

It appears to be the nature of controversies over educational opportunity that they do not end. The interests of the various affected parties are too intense and the volumes of resources at stake too large for final resolutions to be reached. In Connecticut, the struggles continue, both around the issues of financial equity addressed in *Horton* and around the issues of racial and economic isolation

145. McDermott et al., *supra* note 136, at 18.

146. *Id.* at 22-24. Some of the legislative reforms adopted in 2001 were designed to deter some of these “reverse” transfers, *see* Lohman & Shepard, *supra* note 136, at 3, although the efficacy (and constitutionality) of those measures remain open questions.

147. Lohman & Shepard, *supra* note 136, at 6-7.

148. Author’s calculations from Connecticut Department of Education data. *See supra* note 102. By 2000-01, the districts in ERG I were spending an average of \$10,334, compared to the statewide average of \$8983. This trend actually began in the early 1990s in response to state programs enacted while *Sheff* was proceeding through the courts, although it appears to have accelerated in more recent years.

149. *See* THE EDUCATION TRUST, THE FUNDING GAP 3 (2002) (finding a spending gap in Connecticut, after adjusting for the extra costs of educating at-risk students, of only \$6 per pupil). The report also identifies Connecticut as one of the states showing the greatest progress on this measure since a prior study in 1997.

150. Author’s calculations from Connecticut Department of Education data. *See supra* note 102.

addressed in *Sheff*. Before we turn to the attempt to derive some lessons from the course of these two constitutional challenges, it may be helpful to bring their histories up to the present (or at least up to the time this article went to press).

When we left the *Horton* story some pages ago,¹⁵¹ the legislature had responded to the court's signals in *Horton III* by enacting and starting to fund its foundation-based Educational Cost Sharing (ECS) formula, which the *Horton* plaintiffs had decided not to subject to further judicial scrutiny. As with its Guaranteed Tax Base (GTB) forebear, the original ECS formula was designed to have a substantial equalizing effect, by allocating large sums of state money to the less fiscally advantaged districts. But, as with the GTB program before it, as implementation of ECS went forward in the early 1990s, the legislature proved unable to come up with the full amount of anticipated resources and made a variety of adjustments to contain the program's costs, thereby diminishing its benefits to poorer communities.¹⁵² The "guaranteed wealth level" against which districts' needs for state aid were measured was reduced from twice the median town's wealth to a multiple of 1.55.¹⁵³ And the foundation cost of educating a typical child, instead of being set annually by reference to the eightieth percentile district, was frozen and then limited to modest legislated increases.¹⁵⁴ Finally, districts' annual increases in aid were subjected to a series of caps and hold-harmless provisions that substantially diminished the formula's equalizing effect.¹⁵⁵

The cumulative effect of these modifications was to allow growing variations in the amounts expended by high-spending and low-spending districts. In 1996, the districts in the best funded socioeconomic Educational Reference Group (ERG) were spending about fifty percent more than those in the lowest-spending ERG, but by 2000 this gap had grown to approximately eighty percent.¹⁵⁶ Meanwhile, the state's share of Connecticut school funding, which had reached a peak of 45.5% in 1989-90, had dropped back to 38.5% by 1996-97.¹⁵⁷

In response to these retreats from the *Horton*-based goals of the ECS program, a coalition drawn from a dozen of the needier districts (including New

151. See *supra* notes 97-98 and accompanying text.

152. It is noteworthy that, during the same period when the legislature was stepping back from its ECS commitments, it was targeting new funding (although of far smaller magnitudes) to the urban school districts, which were the focus of the *Sheff* litigation then unfolding in the courts and drawing substantial political attention. To what extent *Sheff*'s pendency may have contributed to legislative neglect of the ECS approach is an interesting topic for speculation.

153. See LPR & IC Report, *supra* note 96, at 5. This change reduced formula costs by some \$300 million annually.

154. See *id.* at 6. By 2001, the foundation level was set at \$5891, while the eightieth percentile district was spending \$7349 per pupil. A return to the original approach would have increased formula costs by some \$370 million.

155. See *id.* at 8-9. The savings achieved by the caps ranged as high as \$150 million in some years.

156. See *id.* at 11.

157. See Conn. Gen. Assembly, *supra* note 89.

Haven and Bridgeport, but not Hartford) brought a new lawsuit in 1998. *Johnson v. Rowland* challenged the funding system for failing to provide the substantially equal educational opportunities required by *Horton*.¹⁵⁸ The suit does not challenge the constitutionality of the ECS formula as originally adopted in 1988, but argues that the constellation of subsequent adjustments leaves Connecticut again with a funding system that deprives students in many districts of the educational resources to which they are constitutionally entitled. After repeated delays, motions and discovery, the case is scheduled to go to trial in 2003, but not before several of the plaintiff communities have withdrawn from the case because of its costs.¹⁵⁹

Meanwhile, by December 2000, the *Sheff* plaintiffs decided that enough time had passed and enough experience had accumulated with the legislative remedial efforts to warrant a renewed judicial testing of the adequacy of those remedies. Developments subsequent to the superior court's 1999 ruling indicated little, if any, progress toward *Sheff*'s goals, and legislative interest appeared on the wane.¹⁶⁰ In April 2002, the case came to trial before Judge Julia Aurigemma, the same judge who had issued the 1999 ruling, and evidence and expert witnesses were presented over several days of hearings.

In the 2002 proceedings, the plaintiffs, however, were no longer arguing for mandatory reassignment or redistricting remedies. Instead, they focused their arguments around a plan, prepared for them by an expert witness, calling for dramatically increased state commitments to the voluntary programs already deployed by the state, arguing that sufficient commitments to these programs could achieve substantial progress towards desegregation of the Hartford schools over a four-year period.¹⁶¹ Apparently, even the *Sheff* plaintiffs had concluded that their original goal of truly transforming Connecticut's system of independent municipal school districts, each with their distinct populations and resources, was beyond reach.

158. For background concerning the suit and the plaintiff communities, see Carole Bass, *A Whiter Shade of Sheff? The New Face of Connecticut School Reform*, HARTFORD ADVOCATE, Apr. 30, 1998. In general, the plaintiff communities were characterized by low median incomes, high poverty rates, and high property tax rates.

159. See *City Must Carefully Ponder School Suit*, BRIDGEPORT POST, June 19, 2002, at <http://www.cnnpost.com>.

160. See Rick Green, *Budget Hurts Sheff Efforts; No New School Plans Funded by Legislature*, HARTFORD COURANT, July 24, 2001, at A1 (evidencing lack of progress and quoting a *Sheff* plaintiffs' attorney as saying, "There is absolutely zero sense of urgency. This is not on their radar screen whatsoever. They are either ignoring it or thumbing their nose at the court and the kids whose constitutional rights were violated."). In fact, in the 2000-01 school year, only 753 of Hartford's 24,438 students were attending schools outside the district through the choice program, and only ninety-three suburban students were in the Hartford schools. Interview with Brian Mahoney, Conn. Dept. of Educ. (Aug. 9, 2001).

161. See Report of Leonard B. Stevens, Ed.D. (Jan. 2002), filed as Plaintiffs' Exhibit. See also Robert A. Frahm, *Sheff Plaintiffs Present New Concept*, HARTFORD COURANT, Apr. 17, 2002, at B1 (discussing plaintiffs' strategy).

After several weeks of hearings, the judge asked the parties to submit briefs on the scope of the court's remedial authority. But in midsummer, before the briefs were to be filed, the parties asked the court to suspend further proceedings to allow serious settlement discussions to go forward.¹⁶² Then, in January 2003, after extensive negotiations, the parties announced their agreement to an interim settlement of the case.¹⁶³

The agreement, which defers any further judicial intervention in the case for four years, largely reflects the voluntary desegregation plan proposed by the plaintiffs' expert.¹⁶⁴ The defendants agree to expand the Hartford-region magnet school programs, by adding at least two new magnet schools in each of the next four years at state expense. In addition, they agree to commit additional resources to expansion of the Hartford-region "open choice" program and to interdistrict cooperative programs.¹⁶⁵ The cost to the state of implementing the agreement over its four-year life is estimated at \$45 million of operating costs, plus some \$200 million in bonds to pay for construction of the eight magnet schools. The agreement sets a specific target—that at least thirty percent of Hartford's minority students are benefitting from desegregation due to one of these measures by the 2006-07 school year—but does not make that target legally enforceable. At the end of four years, the parties agree to consult together concerning next steps, with plaintiffs expressly reserving their right to seek judicial enforcement of the supreme court's *Sheff* ruling after June 2007.

The *Sheff* plaintiffs proclaim the interim agreement as a significant victory, especially its establishment of specific numerical goals for magnet schools, spending, and numbers of impacted minority students.¹⁶⁶ Yet, they also acknowledge that it falls far short of the dramatic reforms that were *Sheff*'s original objectives.¹⁶⁷ Many doubts remain. Given the dismal results of the prior efforts, it is far from clear that voluntary measures, which ultimately depend on families' choices about where to school their children, can achieve the scale of progress toward desegregation that the agreement contemplates. Moreover, even

162. See Rachel Gottlieb, *Sides Seek Sheff Pact; Serious Talks in School Desegregation Case*, HARTFORD COURANT, July 13, 2002, at A1.

163. See Robert Frahm, *Sheff Deadline: 2007; Settlement: A Four-Year Effort Begins to Help Undo Hartford's School Segregation*, HARTFORD COURANT, Jan. 23, 2003, at A1; [hereinafter Frahm, *Sheff Deadline: 2007*]; Paul von Zielbauer, *Hartford Integration Plan to Add 8 City Magnet Schools*, N.Y. TIMES, Jan. 23, 2003, at B5. For a description of the process of negotiation, see Robert Frahm, *In Sheff, A Truce, Then a Deal; Months of Talks, Blueberry Muffins, Pay Off In Settlement*, HARTFORD COURANT, Jan. 26, 2003, at A1.

164. See Stipulation and Order, *Sheff v. O'Neill* (Superior Court, No. X03-89-0492119S, dated Jan. 22, 2003).

165. For descriptions of these programs, see *supra* note 138 and accompanying text.

166. See Frahm, *Sheff Deadline: 2007*, *supra* note 163 (quoting lead plaintiff's mother); telephone interview with plaintiffs' attorney Philip Tegeler (Mar. 7, 2003).

167. See, e.g., Oshrat Carmiel, *Milo Sheff's Long Legal Road; After Experience in Landmark School Desegregation Case, He Seeks New Role as Musician*, HARTFORD COURANT, Jan. 23, 2003, at A6; von Zielbauer, *supra* note 163.

if the thirty percent target is met, that leaves seventy percent of Hartford's minority students consigned to constitutionally deficient, segregated schools, surely an ironic achievement in pursuit of a goal of "substantially equal educational opportunity."¹⁶⁸ Finally, the agreement's remedies are targeted exclusively at Hartford's students, with no consideration for the largely comparable plights of the students in Connecticut's other urban centers. At best, the interim settlement marks a way station on the long path to vindication of the rights recognized in *Sheff*.

V. TENTATIVE LESSONS

So, the future of educational opportunity in Connecticut, concerning both money and race, still lies, in significant measure, in the state's courts. Nevertheless, to the extent that we can draw lessons from these unfinished stories, a tentative picture appears to emerge.

In large measure, the judicial response to the two challenges we have explored was similar. In each case, the Connecticut Supreme Court concluded that the challenged disparities among school districts—in the one case, disparities of financial resources, in the other, disparities of racial and ethnic composition—violated the constitutional requirement of substantially equal educational opportunities for all of Connecticut's children. And, in each case, the court left the task of determining how to remedy the unconstitutional disparities to the legislative and executive branches. Again, in each case, the political branches promptly responded, without the additional judicial prodding that has been necessary in some other jurisdictions.

But the character of the responses and their effects have been very different. The response to *Horton* took the form of two major overhauls of how the state supported the funding of local school districts, reforms which, at least for a significant period of time, substantially reduced the fiscal disparities challenged in the case. By contrast, the response to *Sheff* took the form of an array of measures largely tangential to the problem of racial isolation that lay at the heart of the case, and whose effects on the challenged disparities in district racial composition have been insignificantly small. In short, it seems that, while both lawsuits succeeded in the courts, only one of them succeeded in the real world of the schools.

Before offering some cautious reflections about some of the factors that may lie behind these different outcomes, it may be useful to raise some brief cautions about the very existence of the purported differences. For one thing, the evidence is not as simple as the preceding description would suggest. Funding disparities have fluctuated widely in the years since *Horton I*, and while they certainly diminished during the early years, they have certainly revived, at least to some extent, more recently. It is unclear how much success or progress this

168. See, e.g., Rachel Gottlieb & Daniela Altimari, *Reaction: What About the Kids Who Get Left Out?*, HARTFORD COURANT, Jan. 23, 2003, at A1; Paul von Zielbauer, *Change in Hartford*, N.Y. TIMES, Jan. 24, 2003, at B5 (describing concerns of experts and parents).

actually reveals. Conversely, in the case of *Sheff*, it can certainly be argued that the early data show some signs of modest achievements, and that, with time, the continuing pressure provided by the case may generate meaningful long-term change.

Moreover, it is less than self-evident that funding gaps or percentages of minority students are even the right metrics on which to focus. Presumably, the ultimate goal behind both litigation strategies was overall improvement of educational opportunities for underserved children, not equalization of resources or reduction of racial isolation. Indeed, the *Sheff* plaintiffs framed their initial suit to focus at least as much on the educational inadequacies of the Hartford schools as on their racial composition. Measuring the extent of movement toward this broader goal is, of course, far more difficult, but there is at least some indication that the responses to *Sheff*, whatever their effects on racial isolation, may nonetheless positively affect the quality of Connecticut's urban educational opportunities. In addition, the very existence of the *Sheff* case is a reminder that *Horton*'s successes in redistributing dollars did not satisfactorily remedy the failings of some of Connecticut's schools. Success and failure may not be as easily assessed as our tentative conclusions presumed.

With these caveats noted, it does nonetheless appear that the responses to the two suits were significantly different. The closing pages of this article explore some possible explanations for those differences, both in the ways the cases were treated by the courts, in the tactical choices made by the plaintiffs, and in the underlying nature of the issues the two cases presented.

One obvious, and likely significant, difference in the judicial treatment of the two cases is the breadth of consensus among the judges involved in each case. In *Horton I*, there was broad agreement among the trial and appellate judges, with the exception of the one justice dissenting from the final decision. While the supreme court in *Horton III* rejected the trial court's methodology for assessing the constitutionality of the legislative remedy, it did so in a way that largely supported the trial court's results and it remanded the case in a posture that clearly invited a reinstatement of the original finding of unconstitutionality. The overall message was univocal and clear.

By contrast, *Sheff* painted a picture of judicial division. The trial court judge's approach, both in its initial finding of no state action and in its subsequent efforts at outcome determinative fact-finding, was sharply repudiated by the supreme court majority's opinion. The supreme court itself was narrowly and stridently split in its four-to-three decision. The subsequent "slow and steady" ruling by a second trial court judge in the remedial proceeding had a tone strikingly at odds with the urgency of the supreme court's majority. Particularly in light of Chief Justice Peters' departure from the court shortly after she authored the *Sheff* majority opinion, it would not be surprising if the governor and legislature found less pressure for a robust response to *Sheff* than they had for *Horton*.¹⁶⁹

169. See Bass, *supra* note 158 ("The 4-3 decision was the swan song of its author, then-Chief Justice Ellen Peters; her replacement was far more conservative. It seemed all too likely that the

The different responses also were likely influenced by the supreme court's quite different discussions of remedies in their initial rulings in the two cases. As we observed earlier, the *Horton* court, while emphatically deferring remedial choices to the political branches, was nonetheless careful to offer the legislature both guidance and reassurance about the types of remedies that it would find satisfactory. Indeed, the power-equalizing approach (and the accompanying minimum effort requirement) that the legislature selected fell neatly within the range of approaches that the court had invited. By contrast, the *Sheff* court's discussion of remedies, although largely borrowed from *Horton*, lacked any of the guidance or reassurance that *Horton* provided. The governor and legislators may well have been left wondering whether the court would only be satisfied by a radical student reassignment plan, or might accept more modest ameliorative steps, or perhaps had itself been unwilling to contemplate the unsettling range of available but problematic options.

This difference in the court's discussion of remedies in the two cases may be explained by—and its effects certainly were reinforced by—another palpable distinction between the two opinions, a difference in the clarity and precision with which the court characterized the unconstitutional harm that required correction. In *Horton*, the constitutional problem was clear and simple: the existing education financing system failed to provide each district with the resources necessary to “provide a substantially equal educational opportunity to its youth in its free public elementary and secondary schools.”¹⁷⁰ Despite room for question about the standard of “substantial equality,” the court left no doubt that the issue was the equality of resources and their impacts on educational opportunity.

No such clarity is available in *Sheff*. As we saw earlier, the court struggled throughout its opinion to find a satisfactory description of the constitutional problem. Is it the simple fact of significantly different proportions of minority students in different districts (or schools)? Or is it the extreme racial and ethnic isolation found in Hartford and the other urban districts? Or is it the starkly inferior educational opportunities of students in these urban districts, upon which the court focuses in its opening paragraph?¹⁷¹ Or is it the lost opportunities for intercultural exposure and multicultural education that result from the patterns of segregation? No matter how many times one reads the opinion, these competing concerns continue to weave in and out of the court's reasoning.

Legislature would adopt only token changes, the Sheffs would go back to court and the new Supreme Court would refuse to put any teeth in the ruling.”). Perhaps this is also where we find part of the explanation for the *Sheff* plaintiffs' somewhat surprising decision not to appeal the trial court's decision in *Sheff II* and the dramatic shift in their position in the more recent litigation and settlement negotiations. See Lynne Tuohy, *What if Case Had Returned to Court*, HARTFORD COURANT, Jan. 23, 2003, at A7.

170. 376 A.2d at 374-75.

171. The opening sentence of the opinion reads, “The public elementary and high school students in Hartford suffer daily from the devastating effects that racial and ethnic isolation, as well as poverty, have had on their education.” *Sheff*, 378 A.2d at 1270.

No doubt, much of the explanation for this indefiniteness rests in the court's efforts to accommodate the trial court's constricting findings of fact. But the effect is to raise questions, not only about the cogency of the court's reasoning, but more importantly about how the constitutional wrongs can be righted, and indeed about whether the court itself had any sense of what sort of remedy it was anticipating. In light of the court's lack of clarity, it may come as little surprise when the governor, legislature, and trial court all feel free to place their own constructions on what the constitution requires.

Another direction in which to look for explanations for the different outcomes is the tactical decisions of the plaintiffs in the two cases. In particular, a number of the *Sheff* plaintiffs' choices were distinctly different from those of their *Horton* forebears and may have contributed to the disappointing legislative response. For one example, the *Sheff* case presented multiple, complex alternative theories of liability, which may have proven essential to the supreme court's ability to sidestep the trial court's fact-finding, but also invited the problematic ambiguity about the nature of the constitutional wrong that pervades the court's opinion. For another, there seems little question in hindsight that the *Sheff* plaintiffs returned to court too soon to challenge the legislature's remedial scheme, in marked contrast to the *Horton* plaintiffs' wise patience in waiting to seek further judicial intervention until the legislature's own actions had vividly demonstrated both the possibility of a substantial remedy and the degree to which it had failed to provide one. Once they had returned to court and lost in *Sheff II*, it is unclear why the plaintiffs chose not to appeal the decision and give the supreme court an opportunity to repeat its *Horton III* strategy, using its three-step test (and perhaps, a *Horton*-inspired remand) to keep pressure on the legislature for remedial measures that did not "emasculate the goal of substantial equality."¹⁷² Finally, one wonders why the *Sheff* plaintiffs, in their latest trip to court, chose to abandon their demand for truly sweeping desegregative remedies, in favor of an expanded version of the legislature's voluntary measures. We will be left to speculate what successes a more tenacious approach might have achieved.

While these variations in the actions of the courts and the plaintiffs likely account for some of the difference in the outcomes of the two cases, I suspect that a larger share of the explanation may lie deeper—in our divergent societal attitudes towards issues of money and race. No one who watches or participates in the ongoing struggles over how we fund our public schools can doubt the intensity with which taxpayers, parents, and the decisionmakers who are elected by them care about how education dollars are distributed and controlled. But no one who has participated in American political life can honestly doubt that the emotions aroused by issues of race are even stronger, if sometimes more subterranean.¹⁷³ School funding cases, after all, ultimately only move dollars,

172. 486 A.2d at 1107 (quoting *Mahan v. Howell*, 410 U.S. 315, 326, *amended by* 411 U.S. 922 (1973)).

173. See Ryan, *supra* note 120, at 565-67 (contrasting political reactions to financing cases and desegregation cases); Reed, *supra* note 18, at 208-12 (identifying—and distinguishing—

and with relatively rare exceptions, they simply deliver additional dollars to poor districts, without depriving wealthier districts of the continuing ability to provide even more generous resources for themselves. Desegregation cases, however, actually threaten to change where and with whom our children go to school. In particular, they threaten to throw our children together (so goes the apparent, if sometimes less than conscious, fear) with racially different "others" who may endanger not only their education but their well-being.¹⁷⁴

Much of the reason for the initial turn to school funding litigation a third of a century ago was despair over the inability to overcome the deep-seated resistance—in legislatures, courts, and private behavior—to school desegregation. The decision by the *Sheff* plaintiffs and their institutional allies (including the NAACP Legal Defense Fund and the ACLU) to return to a race-based strategy reflected, not only disappointment with the results of ostensibly successful funding litigation, but also a hope that, at least in an enlightened northern state like Connecticut at the end of the Twentieth Century, racial fears might give way to the goals of racial justice that were expressly embodied in Connecticut's constitution. The firm resistance to any but voluntary remedies, the limited (and often segregation enhancing) response to the voluntary programs that were offered, the extreme care with which the trial courts have sought to contain *Sheff*'s impact, and the celebratory glee with which Connecticut officials greeted the plaintiffs' trial court defeat,¹⁷⁵ all suggest that their hope may have been misplaced.

Indeed, Connecticut's recent history may contain an even gloomier lesson about the relationship between issues of money and race in the schools. The period during which the *Sheff* case has taken center-stage has also been the time in which the state appears to have backed away from its commitment to funding equity, scaling back its commitments to full-funding of the ECS program. In part, this back-sliding can be explained by the fiscal difficulties that confronted the state in the early 1990s, but even during the ensuing boom years, the retrenchment generally continued.

These boom years were also the years in which the pendency of, and then the decision in, *Sheff* directed some additional state resources to the poor urban "priority" districts (although far less than was being withheld from ECS funding). The troubling question that must be raised is whether a perception that state school funding was being used to support poor, minority children in inner-city schools tagged school aid with the race label and thereby undermined public support for continued dedication of state resources to the schools. Certainly, the proponents of *Johnson v. Rowland* were sensitive to this possibility in framing

economic self-interest and "symbolic racism" as key factors limiting the efficacy of judicial school finance decisions).

174. See Bass, *supra* note 158 ("Sheff scares a lot of people. It's the 'busing' case, the one that could send black kids to suburban schools — and, even scarier, send suburban white kids to the inner city.").

175. See *id.* (reporting that Gov. Rowland greeted the trial court's decision "with a public champagne celebration").

their case. They assembled a plaintiff roster primarily composed of white students and non-urban school districts, and, in publicizing the case, have been at pains to distance themselves from *Sheff*.¹⁷⁶ Still, the concern remains that, once school-funding initiatives have become identified with issues of race, they may take on baggage that diminishes their appeal. Perhaps *Sheff*, by focusing on race rather than money, has unearthed obstacles, not only to the accomplishment of its own objectives, but for the less threatening objectives of *Horton* as well.

Returning to the question with which we began, what do these histories of Connecticut's school cases reveal about the hopes for using the courts to pursue the ends of social justice? The tentative lessons are neither entirely cheerful nor entirely disheartening. The Connecticut Supreme Court has seized the opportunities provided by *Horton* and *Sheff* to proclaim a courageous, if at times somewhat cloudy, constitutional mandate for both racial and financial equality of educational opportunity—a mandate that directly confronts powerful established relationships of class and privilege. The court's mandate has catalyzed substantial changes in those established relationships, though more modest changes than the cases' proponents sought and, perhaps, anticipated. At the same time, these histories highlight the resistances that can undermine the power of judicial rhetoric, and they reinforce doubts about the capacity of litigation to overcome our most deep-seated societal biases. In addition, they suggest that specific choices of targets, tactics and timing, both by litigants and by courts, may make large differences in outcomes. Care and caution are called for; despair and disengagement are not.

176. *See id.*

INEQUITABLE EQUILIBRIUM: SCHOOL FINANCE IN THE UNITED STATES

JEFFREY METZLER*

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INTRODUCTION

Fifteen years after *Brown v. Board of Education*,¹ as the effort to desegregate America's schools continued, reformers began to turn to other areas of educational inequality. One of the most important of these areas was school finance, where wide disparities in per pupil spending existed between wealthy districts and poor districts. In 1970, authors John Coons, William Clune, and Stephen Sugarman published a book entitled *Private Wealth and Public*

* Clerk, Judge Diana Motz, U.S. Court of Appeals for the Fourth Circuit. J.D., Yale Law School, 2002; M.P.A., Columbia University School of International & Public Affairs, 1999; B.A., Brown University, 1995.

1. 347 U.S. 483 (1954).

Education, in which they argued that the Equal Protection Clause of the United States Constitution could be read to prohibit states from tying school spending to local property wealth.² The authors argued that the Constitution required that a state's school finance system should mandate that a district's per pupil spending could not be directly correlated with the district's local wealth.³ This concept came to be known as "wealth neutrality."⁴

In 1971, the California Supreme Court agreed with Coons and his co-authors, and held that the California state education finance system violated the Equal Protection Clause of the United States Constitution and comparable provisions of the state constitution.⁵ The court held that California, like many other states, relied too heavily on local property taxes to fund education. This reliance led to a correlation between district wealth and school spending primarily because districts with high property values could generate substantial revenue through local taxes. Districts with relatively low property values had to either tax themselves at a much higher rate to generate the same education revenue or simply spend less per pupil. Many poor districts were forced to do both. The California Supreme Court found this arrangement unconstitutional and ordered the state legislature to equalize per-pupil funding across the state.⁶

Two years later, the United States Supreme Court rejected this reading of the Federal Constitution.⁷ In an Equal Protection challenge to the Texas education finance system, the Court held that education was primarily a state responsibility, and was not a fundamental interest protected by the Federal Constitution. The Court ruled that Texas' rationale for funding education through local property taxes satisfied the rational basis test applied to state infringement of non-fundamental rights.⁸

This decision forced education finance reformers to turn to state courts and legislatures. As of 1999, forty-three out of fifty states have faced legal challenges in state court alleging that the school finance system violated the state constitution's education or equal protection clause;⁹ twenty of these states have lost these challenges and been ordered to reform the education finance system.¹⁰ Furthermore, state legislatures have acted whether plaintiffs won or lost in court: since 1973 every state in the nation has passed some type of education finance

2. JOHN E. COONS ET AL., PRIVATE WEALTH AND PUBLIC EDUCATION 153, 295-311 (1970).

3. *Id.*

4. Robert Berne & Leanna Stiefel, *Concepts of School Finance Equity: 1970 to the Present*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE 7, 16-18 (Helen Ladd et al. eds., 1999) [hereinafter EQUITY AND ADEQUACY].

5. *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971).

6. *Id.*

7. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

8. *Id.* at 37-41.

9. Paul A. Minorini & Stephen D. Sugarman, *School Finance Litigation in the Name of Educational Equity: Its Evolution, Impact, and Future*, in EQUITY AND ADEQUACY, *supra* note 4, at 34, 35.

10. William Evans et al., *The Impact of Court-Mandated Sch. Finan. Reform*, in EQUITY AND ADEQUACY, *supra* note 4, at 72.

reform.¹¹ Many state reforms were designed to accomplish greater spending equity, greater wealth neutrality, or both.

While most studies agree that in almost every state, wealthy districts continue to spend more per pupil on education than poor districts, researchers disagree over whether school finance reforms have made things better than they used to be. A 1999 study by William Evans, Sheila Murray, and Robert Schwab argued that court-mandated reform "has achieved its primary goal of fundamentally restructuring school finance and generating a more equitable distribution of resources."¹² This study, however, was recently challenged in an article by Caroline Hoxby, who argued that equalization efforts have often left poor districts worse off than before.¹³ Hoxby argues that while state courts and legislatures may not be confused about their goals in attempting to equalize spending across districts, "[s]tates are confused about how to *implement* their goals."¹⁴

The approaches that states currently use to "implement their goals" are typically grouped into six categories: flat grants, foundation programs, percentage equalizing, guaranteed tax base, guaranteed tax yield, and full state funding.¹⁵ While all six can be shown to have some equalizing effects, it is often assumed that the order in which they are listed above correlates roughly to the degree to which they equalize the allocation of education resources. In other words, flat grants equalize the least, foundation programs slightly more so, etc. In fact, Coons and his co-authors designed what became known as the "guaranteed tax base" and "guaranteed tax yield" approaches with the explicit purpose of achieving what became known as "wealth neutrality."¹⁶

This paper provides an in-depth analysis of these six approaches, and details the connections between a state's basic approach to education funding and equity outcome measures. I began my research assuming—as I think most legislators do—that the different funding approaches produce different equity outcomes. After conducting an empirical analysis, however, I learned that no connection can be made between a state's basic approach to education finance and the equality of educational opportunity provided to students.

In the following sections, I will demonstrate both theoretically and empirically why there is very little difference in the equitable distribution of

11. Caroline Hoxby, *All School Finance Equalizations Are Not Created Equal*, 116 Q. J. ECON. 1189, 1190 (2001).

12. Evans et al., *supra* note 10, at 93.

13. Hoxby, *supra* note 11, at 1190.

14. *Id.* at 1189.

15. For a general discussion of the different approaches to allocating funds to local schools, see AMERICAN EDUCATION FINANCE ASSOCIATION, PUBLIC SCHOOL FUNDING IN THE UNITED STATES AND CANADA, 1993-94, at 27-31 (1995) [hereinafter AEFA]; MARK G. YUDOF ET AL., EDUCATION POLICY & THE LAW 776-77 (1992); see also KERN ALEXANDER & RICHARD SALMON, PUBLIC SCHOOL FINANCE (1995); JAMES GUTHRIE ET AL., SCHOOL FINANCE AND EDUCATION POLICY (1988); DAVID M. MONK, EDUCATION FINANCE (1990); ALLEN ODDEN & LAWRENCE PICUS, SCHOOL FINANCE (1992).

16. See COONS ET AL., *supra* note 2, at 295-31; YUDOF ET AL., *supra* note 15.

education resources under the six basic funding approaches used by states. My theoretical demonstration focuses on how the formulas used to calculate state aid under each approach can be, and often are, manipulated so as to make them mathematically equivalent. My empirical demonstration focuses on a statistical analysis of the correlation between a state's basic approach to education finance and the degree of equity in that state's allocation of education resources. The analysis, which includes all fifty states, shows that the distribution of education resources in a state does not significantly depend upon the funding approach a state adopts for allocating education resources.

Finally, I propose a hypothesis for explaining these results, which I call the inequitable equilibrium of school finance. In many states, the distribution of education resources is primarily a function of the distribution of political power in the state. This distribution is the "equilibrium point," and in many states it is an inequitable equilibrium insofar as it permits wealthy districts, even at lower tax rates, to spend more per student than poor districts.

My hypothesis is that while an outside event, such as an adverse court ruling, may temporarily upset this equilibrium, in many cases the system will gradually return to its equilibrium point, or something close to it. Thus, while a state may change its basic approach to education funding in response to outside pressure, the legislature often manipulates that approach in order to restore the previous equilibrium. The experiences of three states—Washington, New Jersey, and Vermont—further support the inequitable equilibrium theory.¹⁷

This is not to say that the situation is entirely hopeless or that political equilibria cannot be changed. There are, and I hope that there will continue to be, states in which school finance reform has resulted in lasting improvements in the equitable distribution of education resources.¹⁸ Rather, my argument is that common assumptions notwithstanding, a state's adoption of a nominally more progressive school finance formula will not necessarily result in a more equitable allocation of education resources. To achieve this latter goal, courts and reformers must dig deeper, and they must focus on changing the political dynamics that perpetuate the inequitable equilibrium of school finance.

I. DEFINING EQUAL EDUCATIONAL OPPORTUNITY

State education finance systems are designed to serve several goals. Since at least the beginning of the Twentieth Century, one of these goals has been to provide all students with equal opportunities to succeed.¹⁹ The concepts of "equal opportunity" and "equity," however, have many different definitions. These differences often lead to the pursuit of conflicting policies among legislators, courts, and the public, with the different parties seeking to achieve competing conceptions of equal opportunity. This section briefly outlines some

17. See *infra* Part VI.

18. Cf. e.g., Molly A. Hunter, *All Eyes Forward: Public Engagement and Educational Reform in Kentucky*, 28 J.L. & EDUC. 485 (1999) (describing movement toward more equitable distribution of education resources in Kentucky since 1989).

19. Berne & Stiefel, *supra* note 4, at 7.

of these competing conceptions in an effort to familiarize the reader with the philosophical debate that often underlies school finance discussions. I do not attempt to make a normative argument about what equal opportunity should mean, either philosophically or politically. Rather, the overall goal is to make a positive argument about the extent to which education finance systems meet some of the outcome measures commonly used to evaluate different conceptions of equal opportunity.

Generally, many agree that the idea of equal opportunity is that

all students should have an equal chance to succeed, with actual observed success dependent on certain personal characteristics, such as motivation, desire, effort, and to some extent ability. [Put] [i]n negative terms, the idea of equal opportunity is that success should not depend on circumstances outside the control of the child, such as the financial position of the family, geographic location, ethnic, or racial identity, gender, and disability.²⁰

Equal opportunity can be measured in terms of either inputs, such as dollars per pupil, or outputs, such as reading achievement. Equal opportunity measured in terms of inputs asks whether there is a relationship between the resources allocated per pupil in a district and some educationally irrelevant factor, such as a district's property wealth or racial composition. Equal opportunity measured in terms of outputs looks to the relationship between district wealth and student achievement measures (e.g., test scores, graduation rates, etc.). The greater the relationship between district wealth, on the one hand, and input or output measures, on the other, the lesser the equality of opportunity in that state.

Choosing among these and other similar standards is no easy task, and is a major source of disagreement over what constitutes equal opportunity. Measuring the equity of inputs may be simple, but the inputs may not bear any significant relationship to *educational* opportunity. For example, if a state were to pass a law requiring that every school age student be provided with exactly the same pair of shoes, and that no other shoes could be worn to school, the input of footwear would be equalized. Few would argue, however, that equalizing this input would in any way equalize educational opportunity, because we recognize that the shoes that a child wears to school have little to no impact on her learning. And while most of us can agree that the type of shoe a child wears to school does not impact the quality of her education, there is surprisingly little consensus over what, if any inputs *can* meaningfully affect the quality of a student's education.²¹

20. *Id.* at 13.

21. Compare, e.g., Eric A. Hanushek, *The Economics of Schooling: Production and Efficiency in Public Schools*, 24 J. OF ECON. LIT. 1141, 1148 (1986) (finding no relationship between spending and outcomes); Eric A. Hanushek, *Throwing Money at Schools*, 1 J. AM. PUB. POL. & MGT. 19 (1981) (same), with Ronald Ferguson & Helen Ladd, *How and Why Money Matters: An Analysis of Alabama Schools*, in HOLDING SCHOOLS ACCOUNTABLE 265, 265-66 (Ladd, ed. 1996) (arguing that inadequate measures of resources may have influenced earlier findings and illustrating how more meticulous measures of inputs can lead to positive findings of positive effects of resources on outputs); Frederick Mosteller et al., *Sustained Inequity in Education: Lessons from*

Furthermore, even if meaningful inputs could be identified and equalized, many would argue that this would fall short of providing equal opportunity to all students. Since the Coleman report first demonstrated in 1966 the strong correlation between a student's socioeconomic status and educational performance,²² many have argued that merely equalizing school-related inputs would not provide children from disadvantaged backgrounds with an equal educational opportunity, but, rather, would perpetuate or even exacerbate societal inequities.²³

Outcome standards, on the other hand, present their own set of difficulties.²⁴ Attempting to eliminate any correlation between standardized test scores and "educationally irrelevant" factors, for example, simply begs the question of which factors to consider "educationally irrelevant" and which to deem "educationally relevant."

In the school finance context, equal opportunity has historically been defined primarily in resource (or input) terms.²⁵ In particular, school finance literature has stressed one particular conception of equal opportunity, known as wealth—or fiscal—neutrality.²⁶ The concept of wealth neutrality was developed in a 1970 book entitled *Private Wealth and Public Education*, as a basis for legal challenges to a state's education finance system.²⁷

Coons and his co-authors argued that Supreme Court precedent could be read

Skill Grouping and Class Size, 66 HARV. EDUC. REV. 797 (1996); ANITA A. Summers & Barbara L. Wolfe, *Do Schools Make a Difference?* 67 AM. ECON. REV. 639, 643-46 (1977) (indicating that some school inputs such as small class size and teacher experience can significantly affect student achievement). See generally YUDOF ET AL., *supra* note 15, at 774.

22. JAMES COLEMAN ET AL., *EQUALITY OF EDUCATIONAL OPPORTUNITY SURVEY* (1966).

23. This argument is commonly referred to in terms of vertical equity. Vertical equity is the idea that unequal persons should be treated unequally. Notions of vertical equity underlie "weighting" policies that provide additional funds to schools with high numbers of learning disabled students, for example, since these students are generally understood to require greater attention to succeed. In its most extreme form, vertical equity prescribes equal educational outcomes for all students. Horizontal equity, by contrast, is the notion that "like persons" should be treated alike.

24. See generally Mark G. Yudof, *Equal Educational Opportunity and the Courts*, 51 TEX. L. REV. 411 (1973).

25. See James Coleman, *The Concept of Equality of Educational Opportunity*, 38 HARV. EDUC. REV. 7 (1968).

26. For a competing conception, see Frank Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969). Michelman argues that wealth neutrality merely substitutes place-wealth-determined inequalities with simple place/wealth determined inequalities. From the perspective of the child, there is little or no moral distinction between the two forms of inequalities. Michelman's competing conception of equal opportunity is that all students should be guaranteed a basic minimum level of education. Insofar as we are part of a market-oriented society, and students will be forced to compete after graduation, Michelman believes that "the minimum is significantly a function of the maximum and to that extent calls for equalization." *Id.* at 58.

27. COONS ET AL., *supra* note 2, at 317-37.

to support the proposition that the quality of public education may not be a function of wealth other than the total wealth of the state.²⁸ The idea of wealth neutrality is to sever the correlation between local district property wealth per pupil and the amount of money spent per pupil, while at the same time preserving local decision making. This has two implications: first, if fully implemented, a wealth-neutral system would distribute tax income to create equal tax “yields” for equal tax rates; second, it would not require that districts choose the same tax rates, thereby preserving local control over how much money is raised locally. Inequalities in expenditures could persist under this standard, but they would not be caused by inequalities in property wealth per pupil.

Coons and his co-authors also proposed a school finance system—known as “power equalizing”—designed to achieve the objective of wealth neutrality.²⁹ Under power equalizing formulas, local expenditure levels are based on the local tax rate chosen by the district, regardless of the value of property in the locality. Thus, if local property values are too low to produce the revenues called for under the state’s guaranteed expenditure level for the specific tax rate selected, state aid makes up the difference. On the other hand, if local property, taxed at the specified tax rate, yields *more* than the state guarantee in revenue, the state would “recapture” the surplus.³⁰

Many reformers adopted the Coons argument for fiscal neutrality and used it to press reform in courts and state legislatures. Since 1973, every state in the nation has passed some form of school finance reform legislation,³¹ and six states have at one point used some form of DPE system.³² In this context, it is not surprising that many people assume that adopting a DPE system will necessarily lead to greater equality of educational opportunity. After all, they were designed for that explicit purpose. As we shall see, however, DPE has not been the radical break from inequitable methods of school financing that its authors had hoped.

Another concept commonly used in evaluating the equality of educational opportunity is horizontal equity. Horizontal equity is based on the notion that similarly situated students ought to receive similar resources.³³ Horizontal equity differs from wealth neutrality in that it makes no effort to control for differences in local preferences for education spending. One of the debates surrounding horizontal equity is what constitutes “similar students” for purposes of determining equal funding. For purposes of calculating the number of students in a district, many states currently “weight” students with certain characteristics differently than other students. For example, some states count special education students as 1.25 students, implying that they are 25% more expensive to educate than students weighted at 1.00. Which characteristics should be weighted, and

28. *Id.* at 304.

29. *Id.* at 200-42. Power equalizing later came to be known as district power equalizing (DPE), guaranteed tax base (GTB) or guaranteed tax-year (GTY) formulas. See YUDOF ET AL., *supra* note 15, at 776-77.

30. YUDOF ET AL., *supra* note 15, at 771-72.

31. Hoxby, *supra* note 11, at 1090.

32. Berne & Stiefel, *supra* note 4, at 18 (citing AEFA, *supra* note 15, at 24).

33. *Id.*

what the weighting should be, are extremely controversial elements of the debate over what constitutes "horizontal equity."

I will use four outcome variables to measure equal opportunity and horizontal equity: wealth neutrality score, targeting score, coefficient of variation, and McLoone Index. The first of these, the wealth neutrality score, is an *ex post* measure of Coons' ideal of wealth or fiscal neutrality. The score measures the observed correlation in the state between a district's actual spending per pupil from all sources, including federal, state, and district money and the value of that district's taxable property.³⁴ The larger the wealth neutrality score, the greater the connection between district spending and district wealth, and, therefore, the lower the equality of opportunity (as defined by Coons in the school-finance context) in the state.

A targeting score is similar to a wealth neutrality score, except that it measures the correlation between district wealth and state aid per pupil to that district, rather than total spending per pupil.³⁵ Thus, the targeting score focuses exclusively on the redistributive nature of money allocated by the state, irrespective of the local district's contribution. A negative targeting score indicates that state aid is targeted to poor districts.

The third and fourth measures—coefficient of variation and McLoone Index—are measures of horizontal equity. These measures use different techniques to measure the amount of interdistrict variation in per-pupil spending in a given state. The coefficient of variation is calculated by dividing the standard deviation of adjusted spending per pupil across all districts in a state (adjusted to reflect cost differences and student needs) by the state's average spending per pupil.³⁶ The fourth measure, the McLoone Index, reflects the amount of money that would be required to bring districts in the bottom half of spending up to the median spending level. It is calculated by dividing the amount spent by districts in the bottom half by the actual dollar amount needed to raise those districts up to the midpoint.³⁷ These two measures, however, are less reflective of equal opportunity, as they do not account for variation in district wealth. Even in a state where there was no correlation between district wealth and per pupil spending, there could still be variation since the Coons definition of equal opportunity does not require total equality of spending across all districts. Thus, education spending in a state could theoretically be perfectly wealth neutral, but still have a significant coefficient of variation, or low McLoone Index score.

34. EDUCATION WEEK, QUALITY COUNTS 2001, at <http://www.edweek.org/sreports/qc01> (last visited Mar. 26, 2003).

35. *Id.*

36. *Id.* See also ROBERT BERNE & LEANNA STIEFEL, THE MEASUREMENT OF EQUITY IN SCHOOL FINANCE 19 (1984).

37. EDUCATION WEEK, *supra* note 34; see also BERNE & STIEFEL, *supra* note 36.

II. DIFFERENT APPROACHES TO ALLOCATING STATE AID

In order to meet various goals, including those of equal educational opportunity and horizontal equity, states have developed a number of different approaches to allocating state education aid. These different approaches are typically grouped into six different categories.³⁸ These six categories are flat grant programs, foundation programs, percentage equalizing programs, guaranteed tax base, guaranteed tax yield, and full state funding. The standard description found in the literature and replicated in this section assumes that there are significant differences in the equality of opportunity afforded under each approach. These differences are generally believed to be the result of different philosophies and values underlying each approach. In the remainder of the paper, however, I will demonstrate that while there may be different philosophies behind the approaches, there are not, in practice, significant differences in the equitable allocation of resources under each approach.

A. Flat Grants

Flat grants are the simplest of any state aid formula: each district receives a set amount of money for every student unit, regardless of that district's capacity to pay. The philosophy behind flat grants is one of minimum or adequate provision. Since there is no obligation on the part of local districts to supplement this flat grant amount, it should ideally represent the state's judgment as to the minimum amount of money necessary to provide a student with an adequate education. Often, however, flat grants are not connected in any way to educational judgments, and states rely on local districts to provide substantial additional funding.

Example: If State X adopted a flat grant program of \$4000 per pupil, every district in the state would receive that amount from the state. Any education revenue raised through local taxes supplements the \$4000 in state aid.³⁹

B. Foundation Programs

The philosophy behind foundation programs is similar to that of flat grants: minimum or adequate provision. Under a foundation program, however, each school district is only given a level of funding necessary to guarantee each of the district's pupils access to a minimum level of per-pupil expenditures. This is done by taking into account each local district's ability to raise revenue. Districts with greater ability to raise revenue locally receive less state aid under a foundation program than districts with relatively less local wealth. This design is intended to make foundation programs more progressive than flat grants.

38. See generally *supra* note 15.

39. Flat grant programs can be represented mathematically as $A_i = FN_i$, where A_i = the dollar value of the state's grant to the i th district, F = the flat grant level, and N_i = the number of pupils in the i th district (suitably weighted).

The first step in calculating state aid under a foundation program is the same as under a flat grant program. The number of student units in a district is simply multiplied by the state-determined minimally adequate per-pupil expenditure. In a foundation program, however, a local district's ability to pay, as determined by the state, is then subtracted from the flat grant level. In some states, local districts are then required to provide these additional resources. This is called a mandatory local effort provision. Other states, however, do not require local effort but nevertheless use local districts' ability to pay as a computational device in determining the amount of basic support aid. Districts are then free to determine their own tax rates, which could result in per pupil expenditures of either more or less than the minimally adequate level set by the state.

As with flat grants, the foundation level is rarely tied to any measure of the cost of providing an adequate education. Consequently, most local school districts impose taxes that enable them to spend more than the foundation level, usually considerably more. "Because this spending generally is not equalized, foundation programs place school districts with relatively small per-pupil tax bases at a disadvantage relative to school districts with larger per-pupil tax bases."⁴⁰

Example: A state with a foundation level of \$5000 per pupil and a local effort requirement of 1% would give \$4000 per pupil in state aid to a district with a tax base of \$100,000 per pupil (\$5000 less 1% of \$100,000), but only \$3000 per pupil to a district with a tax base of \$200,000 per pupil (\$5000 less 1% of \$200,000).⁴¹

C. Percentage Equalizing Programs

Percentage equalizing programs are thought to provide aid based on a philosophy of equal access to educational funding, with each district deciding the level of spending. In a percentage equalization program, the state matches local contributions with state aid at a ratio inversely related to a district's ability to pay. In other words, wealthy districts receive less state aid than poor districts for every dollar of local contribution. The theory is that while decisions about tax rates and school revenue are made locally, state aid is used to ensure that equal local effort results in equal available educational revenue. To do this, districts with lower capacity to raise revenue through local taxes receive greater levels of state aid.

State aid is calculated under percentage equalization programs according to a state aid ratio based on a district's relative ability to pay. Poor districts will tend to have higher state-aid ratios than wealthy districts. State aid is then determined by multiplying this state-aid ratio by the local district's total

40. AEFA, *supra* note 15, at 28.

41. Foundation programs can be represented mathematically as $A_i = FN_i - rW_i$ where A_i = the dollar value of the state's grant to the i th district, F = the foundation grant level, N_i = the number of pupils in the i th district (suitably weighted), r = the common tax rate selected by the state, and W_i = the total value of the i th district's tax base.

expenditure.

Example: If the state aid ratio in district [A] were 0.60, the state would contribute 60% of district A's budget, while the remaining 40% would come from locally generated revenues. If district [A] wants to spend \$10,000 per pupil, it would have to raise \$4000 per pupil through local taxes, while the state would give the district \$6000 per pupil.⁴²

Theoretically, the state could continue to match local contributions regardless of how much the district wants to spend. In practice, however, most states establish limits on state aid, known as spending ceilings. The ceilings establish a maximum per-pupil contribution that the state will make to any district, even if that district chooses to tax itself at a higher rate. In these cases, where the ceiling is set below the per-pupil expenditure in the district, the percentage equalizing program functions the same way as a foundation program.⁴³

D. Guaranteed Tax Base

The guaranteed tax base and the guaranteed tax yield approaches were designed by Coons, Clune, and Sugarman to achieve the objective of wealth neutrality.⁴⁴ Like that of percentage equalizing programs, the philosophy of the guaranteed tax base approach is to provide each district with equal access to education funding, while allowing decisions about the appropriate level of funding to be made locally. Under the guaranteed tax base approach, state aid is used to ensure that for purposes of generating education revenue, every district has the same tax base. When local districts choose a tax rate, the education revenue generated is based on the guaranteed tax base, rather than the district's actual tax base. Districts with tax bases higher than the guaranteed tax base forfeit additional revenue generated to the state.

Example: If the state guaranteed a tax base of \$1,000,000 per pupil, an effective local tax rate of 1% would yield \$10,000 per pupil, regardless of a district's actual tax base. If the tax base in Poor District were \$400,000 per pupil, that district would receive \$6000 per pupil in state aid if it taxed itself at a 1% rate. If the tax base in Middle District were \$1,000,000 per pupil, the district would receive no additional state aid. Rich District, with a \$1,500,000 per pupil tax base, would have the same

42. Percentage equalization programs can be represented mathematically as:

$$A_i = \left[1 - \left(\frac{W_i}{W_s} \right) \right] * E_i N_i$$
, where A_i = the dollar value of the state's grant to the i th district, W_i = the total value of the i th district's tax base, W_s = an arbitrary measure of fiscal capacity set by the state for use in this formula, E_i = the per-pupil expenditure for the i th district, and N_i = the number of pupils in the i th district (suitably weighted).

43. In this case, where the spending ceiling level (S) is less than the per-pupil expenditure in the district (i.e., $S < E_i$), the percentage equalizing formula becomes a foundation grant in which $F = S$ and $r = 1/W_s$.

44. COONS ET AL., *supra* note 2, at 33-35.

\$10,000 per pupil to spend on education, and would have to give the remaining \$5000 in generated revenue to the state.

This is known as a recapture provision.⁴⁵

E. Guaranteed Tax Yield

The guaranteed tax yield approach is simply a modification of the guaranteed tax base program. Under the guaranteed tax yield, the state provides matching funds based on the level of local tax effort and the amount of revenues generated by that effort. Local school districts are guaranteed by the state a given amount of revenue per pupil for a given tax effort, regardless of the tax base in the local district.

Example: A state could guarantee revenue of \$10,000 for a district with an effective local tax rate of 1%. For Middle District, where the local tax base was equal to \$1,000,000 per pupil, the state would not contribute any additional aid, and local revenue would be \$10,000 (1% of the tax base). In Poor District, with a local tax base of only \$400,000 per pupil, the state would contribute \$6000 per pupil (\$10,000—1% of \$400,000). If the state had a recapture provision, Rich District, with a local tax base of \$1,500,000 per pupil, would have to give the state \$5000 per pupil (\$10,000—1% of \$1,500,000).⁴⁶

The guaranteed tax yield approach and the guaranteed tax base approach are perfectly equivalent as long as the guaranteed yield is linear (i.e., for any tax rate, doubling the rate yields twice the revenue).

F. Full State Funding

Finally, under a full state funding program, the state assumes full responsibility for providing educational funding. These programs are based on the philosophy of equal inputs, or horizontal equity, and do not allow for local control of spending. All educational funds are raised by statewide taxes and all schools receive the same per-pupil funds. This is essentially the same approach as the flat grant except that local districts are not permitted to supplement state aid from local revenues. The effect is full funding parity across the state, regardless of the district in which a particular student lives. Hawaii is currently

45. The guaranteed tax base can be represented mathematically as $A_i = r_i (V_s - V_i)$ where A_i = the dollar value of the state's grant to the i th district, r_i = the tax rate of the i th district, V_s = the guaranteed per pupil tax base, and V_i = the per-pupil tax base for the i th district.

46. This approach is best represented as a simple chart:

<i>Tax rate</i>	<i>Education Revenue</i>
1%	\$4000
1.5%	\$6000
2%	\$8000
2.5%	\$10,000

the only state whose education finance system can technically be classified as full state funding. While Washington state’s program may be also best classified as full state funding, the state does allow local districts to raise some revenue for limited programs that the state does not provide.⁴⁷

Example: If State X adopted full state funding at the level of \$10,000 per pupil, every district in the state would receive that amount from the state. This amount could not be supplemented with local revenue.⁴⁸

III. ARE THE DIFFERENT APPROACHES REALLY DIFFERENT?

Each of the six approaches can be represented mathematically as shown in Table 1.

Table 1—Mathematical Representation of Basic Approaches to Education Funding	
Flat Grant	$A_i = GN_i$
Foundation Program	$A_i = FN_i - r_f V_i N_i$
Percentage Equalizing	$A_i = [1 - (V_i/V_s)] * E_r N_i$
Guaranteed Tax Base	$A_i = r_i (V_s - V_i) N_i$
Guaranteed Tax Yield	$A_i = (E_r - r V_i) N_i$
Full State Funding	$A_i = TN_i$
where:	
A_i = State aid to i th district	V_s = Per pupil tax base of hypothetical district chosen by state
G = Flat grant amount	E_i = Expenditures per pupil
N_i = Number of students in i th district	E_r = Guaranteed per pupil expenditures for chosen rate
F = Foundation level	T = Full state funding level.
r_f = Foundation rate	
V_i = Per pupil tax base in i th district	

While each formula is written so as to reflect the logic or “philosophy” underlying each approach, the foundation, percentage equalizing, guaranteed tax base, and guaranteed tax yield approaches can be manipulated so as to deliver the same amount of aid to different districts.

Take, for example, the three hypothetical districts discussed above: Poor District, with a local tax base of \$400,000 per student, Middle District, with a local tax base of \$1,000,000 per student, and Rich District, with a local tax base of \$1,500,000 per student. Under a foundation approach, the state gets to choose the foundation level (F), and the foundation rate (r_f). If the state chooses a foundation level of \$15,000 per student, and a foundation rate of 1%, Poor

47. See Appendix B for the American Education Finance Association’s classification of every state’s approach.

48. Full state funding can be represented mathematically as $A_i = TN_i$ where A_i = the dollar value of the state’s grant to the i th district, T = the full state funding level, and N_i = the number of pupils in the i th district (suitably weighted).

District would receive \$11,000 per student in state aid, Middle District would receive \$5000, and Rich District would receive \$0.

Under a percentage equalizing approach, the state chooses the hypothetical tax base (V_s). If the state sets V_s at \$1,500,000, and each district wishes to spend \$15,000 per student, Poor District would again receive \$11,000 from the state, Middle District would receive \$5000, and Rich District would receive \$0.

Under a guaranteed tax base approach, the state again chooses the hypothetical tax base (V_s). If the state sets V_s at \$1,500,000 again, and each district taxes itself at a 1% rate, Poor District would again receive \$11,000 from the state, Middle District would receive \$5000, and Rich District would receive \$0.

Finally, under a guaranteed tax yield approach, the state chooses the guaranteed expenditure for a given rate (E_r). If E_r is set at \$15,000 for a 1% rate, and each district taxes itself at 1%, each district will again receive the exact same amount of state aid.

These results are summarized in Table 2.

Table 2—State Aid to Hypothetical Districts			
	Poor District	Middle District	Rich District
Taxable base per student (V_s)	\$400,000	\$1,000,000	\$1,500,000
Foundation Program	=15,000 – (0.1)(400,000) State Aid = \$11000	= 15,000 – (0.1)(1,000,000) State Aid = \$5000	=15,000 – (0.1) (1,500,000) State Aid = \$0
Percentage Equalizing	= [1 – (400,000)/(1,500,000)] * 15,000 State Aid = \$11,000	= [1 – (1,000,000)/(1,500,000)] * 15,000 State Aid = \$5000	= [1 – (1,500,000)/(1,500,000)] * 15,000 State Aid = \$0
Guaranteed Tax Base	= (0.01)(1,500,000 – 400,000) State Aid = \$11,000	= (0.01)(1,500,000 – 1,000,000) State Aid = \$5000	= (0.01)(1,500,000 – 1,500,000) State Aid = \$0
Guaranteed Tax Yield	= (15,000 – (0.01)(400,000)) State Aid = \$11,000	= (15,000 – (0.01)(1,000,000)) State Aid = \$5000	= (15,000 – (.01)(1,500,000)) State Aid = \$0

While these results reflect a very high level of state commitment, the formulas work the same if the state chooses to reduce the amount of aid being distributed.

For example, under a foundation approach, if the state chooses a foundation level of only \$10,000 per student, and a foundation rate of 1%, Poor District would receive \$6000 per student in state aid, Middle District would receive \$0, and under the formulas, Rich District would owe \$5000.

Under a percentage equalizing approach, if the state sets V_s at \$1,000,000, and each district wishes to spend \$10,000 per student, Poor District would again receive \$6000 from the state, Middle District would receive \$0, and Rich District

would owe \$5000.

Under a guaranteed tax base approach, if the state sets V_s at \$1,000,000 gain, and each district taxes itself at a 1% rate, state aid would be the same for all three districts.

Finally, under a guaranteed tax yield approach, if E_r is set at \$10,000 for a 1% rate, and each district taxes itself at 1%, Poor District would again receive \$6000 from the state, Middle District would receive \$0, and Rich District would owe \$5000.

These results are summarized in Table 3.

Table 3—State Aid to Hypothetical Districts

	Poor District	Middle District	Rich District
Foundation	=10,000 –	= 10000 –	= 10,000 –
Program	(0.1)(400,000)	(0.1)(1,000,000)	(0.1)(1,500,000)
	State Aid = \$6000	State Aid = \$0	State Aid = -\$5000
Percentage	= [1 –	= [1 – (1,000,000)/(1,000,000)]	= [1 –
Equalizing	(400,000)/(1,000,000)]	* 10,000	(1,500,000)/(1,000,000)]
	* 10,000	State Aid = \$0	* 10000
	State Aid = \$6000		State Aid = -\$5000
Guaranteed	= (0.01)(1,000,000 –	= (0.01)(1,000,000 –	= (0.01)(1,000,000 –
Tax Base	400,000)	1,000,000)	1,500,000)
	State Aid = \$6000	State Aid = \$0	State Aid = -\$5000
Guaranteed	= (10,000 –	= (10,000 – (0.01)(1,000,000)	= (10,000 –
Tax Yield	(0.01)(400,000)	State Aid = \$0	(0.01)(1,500,000)
	State Aid = \$6000		State Aid = -\$5000

While there are a number of assumptions built into the results of Tables 2 and 3 so as to simplify the example (such as each district wishing to spend the same amount per pupil, and tax itself at the same rates), each of the approaches is mathematically equivalent under the following conditions:

The Guaranteed Tax Yield and Guaranteed Tax Base programs are equal as long as the yield is linear (i.e., twice the rate yields twice the per-pupil expenditure). When the yield (E_r) is equal to the guaranteed tax base (V_s) multiplied by the rate, the two formulas are equivalent.

These approaches are equal to the percentage equalizing approach when the state chooses as its hypothetical tax base (V_s) the same level as for the guaranteed tax base (V_s), and expenditures per pupil (E_i) are equal to the tax rate multiplied by this guaranteed tax base.

Finally, the percentage equalizing approach is equivalent to a foundation program if the state establishes a spending ceiling (S) that is less than the per-pupil expenditure in the district (i.e., $S < E_i$). State aid is then calculated as $[1 - V/V_s] * SN_i$. This is equivalent to a foundation program in which $F=S$ and $=S/V_s$.

Ironically, the two opposite ends of the spectrum—the flat grant approach and full state funding—are remarkably similar in the way they function. In fact, the formulas for delivering state aid are almost identical (GN_i and TN_i ,

respectively, where G and T are numbers selected by the state). The only difference is whether local districts are permitted to supplement the state aid amount with local revenue. Under the flat grant approach, they are permitted to supplement state aid. Under full state funding, local districts are forbidden by law from supplementing state aid (in Hawaii, local districts do not even exist) to local schools using local revenue.

Thus, even in theory there are really only two different approaches: some form of percent equalizing approach (including foundation programs, percent equalizing programs, guaranteed tax base, and guaranteed tax yield approaches)⁴⁹ and a fixed grant per student (to be either supplemented or not). The possibility of manipulating the formulas to make them equivalent, however, does not exist only in theory. In the next section, I will demonstrate that the nominally different approaches produce, on average, similar equity results, and I will provide evidence of legislative manipulation of the formulas.

IV. DO THE DIFFERENT APPROACHES PRODUCE DIFFERENT RESULTS?

Unpacking the mathematical similarities of the different approaches to education finance leads one to wonder whether the school finance reform efforts of the last thirty years have had any effect on the equitable distribution of resources. The existing literature dealing with this question generally concludes that the results are mixed. Though some states have made substantial progress in eliminating the inequitable distribution of education resources, other states have made no progress or have seen increasing disparities in spending between wealthy and poor districts. This finding raises a second question: when do (or which) reforms successfully reduce spending disparities? Some of the most recent school finance literature, as well as the empirical results reported in this paper, attempt to address this second question.

A. Previous Empirical Studies

A 2000 study released by the National Center for Education Statistics (NCES) concluded that "disparity appears to have fallen from 1980 to 1994, for most states and for most educational finance disparity measures."⁵⁰ However, the NCES also found that disparity increased in a substantial number of states (eleven) over the same time period.⁵¹ Furthermore, the NCES noted that "the decline in disparity does not mean that the state may not still have a substantial amount of disparity."⁵² This echoed the conclusions of earlier studies, which found substantial disparity between districts both within states and across the nation.⁵³ Like earlier studies, however, the NCES report used only horizontal

49. Caroline Hoxby in a recent article refers to these approaches as School Finance Equalization (SFE) approaches. See Hoxby, *supra* note 11, at 1194-97.

50. U.S. DEP'T OF EDUC., NAT'L CENTER FOR EDUC. STATS., TRENDS IN DISPARITIES IN SCHOOL DISTRICT LEVEL EXPENDITURES PER PUPIL 2 (2000).

51. *Id.* at 23.

52. *Id.* at 2.

53. See, e.g., Linda Hertert et al., *School Financing Inequalities Among the States: The*

equity measures, such as coefficient of variation and McLoone Index. It did not look at wealth-neutrality outcome measures.

No longitudinal study of wealth neutrality has been done in the United States over the last thirty years. Two recent studies, however, report current levels of fiscal neutrality in the country. A 1997 study by the United States General Accounting Office concluded that fiscal neutrality has not been achieved in most states:

Although most states pursued strategies to supplement the local funding of poor school districts, wealthier districts in thirty-seven states had more total (state and local combined) funding than poor districts in the 1991-92 school year. This disparity existed even after adjusting for differences in geographic and student need-related education costs.⁵⁴

These results were more recently supported by a 2001 *Education Week* survey of wealth neutrality in all fifty states.⁵⁵ Like the NCES study of horizontal equity, the *Education Week* survey of wealth-neutrality showed wide discrepancies in the wealth-neutrality score from state to state. While a handful have managed to effectively eliminate any correlation between school spending and local wealth, half of the states still have a positive correlation of .087 or higher.

One group of researchers that has attempted to answer the second-order question of when reforms are successful at reducing disparities in spending is Evans, Murray, and Schwab.⁵⁶ These authors examine the impact of school finance litigation by analyzing the change in equity measures following a school finance plaintiff's victory and a court order for education finance reform. By examining the coefficient of variation in states before and after court reform, the researchers concluded that "court-mandated education finance reform can decrease within-state inequality significantly."⁵⁷

The study also examined the impact of school finance reform on a state's overall average expenditures per pupil. This is of interest to many school finance researchers, because most legislators seek to achieve greater equality by increasing the amount of money spent in poor districts (known as "leveling up"), rather than decreasing the amount spent in wealthy districts (known as "leveling down"). Evans and his co-authors conclude from their study that "court-ordered reform reduces inequality by raising spending at the bottom of the distribution while leaving spending at the top unchanged . . . [and] finance reform leads states to increase spending for education and leave spending in other areas

Problem from a National Perspective, 19 J. ECON. FIN. 231, 252 (1994) (finding that "substantial variations remain in the distribution of public education revenues within states, even after years of litigation and legislative action to change these systems.").

54. U.S. GENERAL ACCOUNTING OFFICE, SCHOOL FINANCE: STATE EFFORTS TO REDUCE FUNDING GAPS BETWEEN POOR & WEALTHY DISTRICTS 2 (1997), cited in Berne & Stiefel, *supra* note 4, at 18.

55. EDUCATION WEEK, *supra* note 34.

56. Evans et al., *supra* note 10, at 72.

57. *Id.* at 77.

unchanged.”⁵⁸

These results were challenged in a recent paper by Caroline Hoxby, who argues that the researchers err by not differentiating between types of school finance reform. While the researchers were asking the question of *when* reforms result in greater finance equity and leveling up (answer: when they are enacted in response to a court decision), Hoxby asks the question of *which types* of reform have these results. Hoxby’s argument is that when reforms are differentiated into redistributive efforts that use a district’s local property value in calculating equalization aid (“school finance equalization” (SFE) programs such as foundation programs and guaranteed tax yield programs) and redistributive efforts that use other criteria such as mean income to calculate equalization aid (such as categorical grant programs), SFE programs are far more prone to leveling down than categorical grants. Since many of the reforms enacted over the last thirty years have been moves away from categorical grants and toward SFE programs, Hoxby argues that in many cases these reforms have left *all* districts, rich and poor, worse off than they would have been.⁵⁹

*B. Exploring the Relationship Between the Equity and
Basic Funding Approaches*

My empirical study asks a similar question to Hoxby: *which* reforms tend to be successful in reducing funding inequities? Using data from the U.S. Department of Education and *Education Week*, I examined the relationship between characteristics of a state’s school finance system, such as the basic funding approach, spending limits, pupil weighting, etc., and the four outcome measures of equal opportunity discussed above—wealth neutrality, targeting score, coefficient of variation, and McLoone Index.⁶⁰

Surprisingly, almost no characteristic of a state’s school finance program—not even the basic funding approach—was significantly correlated with outcome measures.⁶¹ In other words, the allocation of resources in states

58. *Id.*

59. See Hoxby, *supra* note 11, at 1190-92.

60. See Appendix A for methodology and data sources.

61. See Appendix F for regression results. The few exceptions were (1) states that used average enrollment or attendance-based pupil counts had greater coefficients of variation and lower McLoone Indexes than states using enrollment; (2) states that measured district wealth using assessed property value (APV) in tandem with other measures had greater coefficients of variation than states using only APV; (3) states with property tax rate limits and general expenditure limits tended to have lower wealth neutrality scores (greater equality of opportunity) while states with assessment increase limits had higher wealth neutrality scores; and (4) states using a combination of APV and income spent approximately \$1000 less per pupil and contributed approximately 9% more than states using other methods of evaluating a district’s tax base. There is some logic behind exception #3 insofar as revenue and expenditure limits would restrict the ability of districts to translate rapid increases in local property value into higher spending on education, while assessment increase limits allow wealthy districts to receive more state aid than they deserve through artificially deflated valuations of the district’s ability to pay. Exception #4 is discussed in

with flat grant or foundation programs were not, on average, any more equitable or wealth neutral than the allocation of resources in states with percent equalizing, guaranteed tax base, or full state funding. Table 4 summarizes the average outcome measures for states categorized by basic funding approach.

Perhaps the most surprising result was that even the targeting score was not significantly correlated with a state's basic approach to education. This was particularly interesting because the targeting score measures the correlation between state aid and district wealth without factoring in local contribution. In other words, the targeting score measures how redistributive state aid is in practice, without any distortion based on the behavior of local districts. Thus, the targeting score reflects the feature that we assume makes the "different" approaches to school finance different: the progressivity, or redistributive nature, of state aid. And yet, in practice, the targeting score shows no significant correlation with school finance approach at all.

Table 4: Mean state outcome, by basic funding approach

Outcome Variable	Flat Grant	Foundation Program (Local Effort Required)	Foundation Program (No Local Effort Required)	Percent Equalizing Program	Guaranteed Tax Base	Full State Funding
State aid as percentage of total education spending*	67.95%	57.58%	48.33%	40.5%	53.95%	84.35%
Targeting Score†	-0.069	-0.194	-0.2089	-0.3537	-0.143	-0.031
Wealth Neutrality†	0.0955	0.0372	0.0917	0.145	0.079	0.0225
Coefficient of variation†	0.071	0.1299	0.1311	0.1425	0.0945	0.0485
McLoone Index‡	0.9449	0.9360	0.9219	0.9158	0.925	0.9706
Spending per pupil*	\$5089	\$4749	\$4994	\$7074	\$5484	\$5112

† Higher scores denote greater inequity.

‡ Lower scores denote greater inequity.

* Indicates that differences in averages were statistically significant at the 0.05 level. See Appendix C for results of ANOVA test.

A second interesting result was that states using a percentage equalizing approach have the highest average correlation between district wealth and spending, and the greatest variation in spending as measured by both the

coefficient of variation and the McLoone Index. This is interesting because percentage equalizing programs are supposed to be more progressive than flat grants and foundation programs, yet in practice percentage equalizing programs appear to be *less* equitable. In the next section, I will address the question of how states using a state aid formula that appears to be more beneficial to poor districts can in practice have equal or greater levels of inequality than states using flat grants or foundation programs.

Third, it is interesting to note that while a state's school finance approach is unrelated to equity outcome measures, it *is* significantly related to both the total spending per pupil and the percentage of that spending that comes from the state (rather than local districts). This is surprising because, as discussed above, the different approaches were designed to impact the equitable allocation of resources; they were not designed to impact a state's total spending or percentage contribution. Changes in overall spending or percentage contribution that results from a modification of the state's approach to school finance are generally treated as unintended consequences. The results of my empirical study suggest that these "unintended consequences" of school finance reform may be more significantly impacted by reforms than the "intended consequences."

Fourth, there is also a negative correlation between a state's average expenditure per pupil and the percentage of education funding that comes from the state. Lower state contributions as a percentage of total spending correlate with higher average spending at a statistically significant level. This was true both when controlling for program type and when not. This result is interesting in the context of the debate over whether school finance reform results in "leveling down" because the percentage of education funding that comes from the state is also correlated with outcome measures of equity. Increases in the state's percentage contribution to education spending is significantly correlated with increased equity in the state, and it is significantly correlated with lower spending overall. This finding lends some support to those who claim that while transferring greater responsibility for education spending from local districts to the state may result in greater spending equity, it will also lead to lower levels of spending overall, or "leveling down."⁶²

A final result not illustrated in Table 4 but worth noting is the significant impact of the method a state uses to assess a local district's ability to pay. States using a combination of assessed property value (APV) and income as a measure of local tax base tend to have significantly greater horizontal equity (as measured by both the coefficient of variation and McLoone Index), significantly greater state percentage, and spend significantly more per pupil than states using only APV. This held true both when controlling for other program variables and when not.⁶³ This result may lend support to arguments that the use of average property value in state aid formulas as a measure of local ability to pay can distort property values, which in turn may undermine the progressive goals of the state

62. See Appendix E.

63. See Appendix F & G (note, however, that coefficient of variation result is only significant at 0.10 level).

aid formula.⁶⁴ My results show that states that rely on APV and income to measure local ability to pay tend to have greater success in achieving equity goals than states that use only APV.

C. Interpretation of Results

There are at least three possible interpretations of my empirical results, all of which may be partially correct. The first is that the different approaches do produce different results, but that small sample sizes prevented differences in programs from being *statistically* significant. This explanation is particularly applicable to generalizations about the basic types of state aid programs, since the vast majority of states (forty) follow the same basic foundation approach. Only two states each are characterized as following flat grant, guaranteed tax base, and full state funding approaches, while the remaining four states are characterized as following a percentage equalizing approach.⁶⁵ Even taking only the most robust statistical results, however, requires one to think more critically about why most program characteristics, including basic funding approaches, fail to correlate with wealth neutrality, targeting score, or horizontal equity.

A second explanation stems from the strong negative correlation found between a state's targeting score and the state percentage.⁶⁶ This suggests that in states with aid formulas that tend to be very redistributive, state aid only accounts for a very small percentage of overall education spending. New Hampshire, for example, distributes aid more progressively than any other state (targeting score = $-.73$), yet accounts for the smallest percentage of overall education spending (state percentage = 7%). New Mexico, on the other hand, does not target additional state aid to poor districts at all (targeting score = 0.00), but only relies on local districts to contribute a small portion of overall education spending (state percentage = 83%).

To illustrate how this could account for the failure of nominally progressive state aid formulas to correlate with greater equality of opportunity or horizontal equity, consider the following hypothetical: State X has only two districts, one with a per pupil tax base of \$100,000, another with a per pupil tax base of \$800,000. If each district assesses a tax of .1%, District 1 would raise \$1000 per student, while District 2 would raise \$8000. If the state only contributes 10% of overall spending, even if that aid is allocated in the most progressive way possible—with \$1000 going to District 1, and \$0 going to District 2—District 1 would end up with \$2000 per pupil, while District 2 would have \$8000 per pupil. Thus, the state's overall education spending pattern would reflect a high correlation between district spending and district wealth, and large horizontal inequities, despite a highly progressive state aid formula. Indeed, despite its dramatically higher targeting score, New Hampshire's wealth neutrality (0.23) is substantially less equitable than New Mexico's (0.07).

While the strong relationship between targeting score and state percentage

64. See, e.g., Hoxby, *supra* note 11, at 1200-05, 1223, 1228-29.

65. See Appendix B for a categorization of each state.

66. See Appendix D.

probably goes a long way toward explaining why there is no correlation between a state's finance system and the equality of opportunity and horizontal equity in that state, it does not explain how the targeting score itself can be unrelated to the different ideals about the equitable allocation of resources supposedly embodied in the different types of state aid programs. In other words, it fails to explain how guaranteed tax base programs, which were designed to be more redistributive, can have statistically equivalent targeting scores (a measure of redistribution) to those of flat grant and foundation programs.

This question is at least partially answered by the third explanation, which is that states in practice manipulate the formulas in the manner suggested in Part IV to make them mathematically and functionally equivalent. Percentage equalizing programs, for example, are mathematically equivalent to foundation programs when states impose a ceiling on equalizing aid; three of the four states that have adopted a percent equalizing approach have spending ceilings. Thus, it might be more accurate to classify these three states as following a foundation approach. Full state funding is mathematically equivalent to a flat grant approach if local districts are permitted to raise additional revenue; one of the two states described as having full state funding permits local districts to raise additional revenue. Perhaps it should be re-classified as following a flat grant approach.

Furthermore, all of the formulas contain variables that are arbitrarily chosen by the state. Manipulating these variables often results in substantial manipulation of how resources are allocated. As demonstrated in Part IV, if these variables are chosen in a particular way, four of the six program approaches yield identical state aid to poor, middle, and rich districts. Finally, many states also allocate state aid to districts through programs other than basic support aid, such as separate funds for construction, transportation, or high-need-student programs. States can manipulate these other programs to offset the redistributive effects of the basic support aid formula.

New York state is an excellent example of formula manipulation. In New York, the state has adopted what is nominally a percent equalizing approach. The state has also added a ceiling provision, however, which makes the percent equalizing formula functionally equivalent to a foundation program. Nevertheless, this represents only the beginning of formula manipulation in New York. Additionally, the state has created a multitude of state aid formulas that have been described by a former New York State Education Commissioner as "an ocean of confusion piled on a pillar of disorder."⁶⁷ In a New York school finance case decided at the trial level last January, the judge held that

[t]he evidence demonstrates that the State aid distribution system is unnecessarily complex and opaque However, more important than the formulas' and grants' needless complexity is their malleability in practice [T]he formulas do not operate neutrally to allocate school funds Rather the formulas are manipulated to conform to budget agreements reached by the Governor, the Speaker of the State Assembly,

67. Plaintiff's Brief at ¶1816, *Campaign for Fiscal Equity v. State*, 719 N.Y.S.2d 475 (2001).

and the State Senate Majority Leader.⁶⁸

This “three men in a room” approach to allocating state aid is obviously unrelated to the nominal philosophy or goals of the state’s approach to school finance; it is an exercise in raw political power. Once these political leaders reach an agreement on the allocation of resources, officials in the state education department run the formulas backwards, manipulating them to produce the desired outputs. In discovery for the trial, plaintiffs uncovered a blank Confidential State Aid Data Form that included “% increase for NYC” in the section entitled “goals.” Plaintiffs then calculated that in each of the last thirteen years New York City received exactly or almost exactly 38.86% of any increases in state aid for that year.⁶⁹ Considering the complexity of the formulas and the annual changes in student population and property values across the state, it defies common sense to believe that the state was using the state aid formula impartially to determine the allocation of resources.

The end result is that while New York state follows a purportedly redistributive approach of percent equalizing, it has one of the most inequitable allocations of resources in the country, with a wealth neutrality score of .17 (5th highest in country), and a coefficient of variation of .20 (2nd highest in the country).

The final outcome of my empirical study is that the results suggest a theory for reconciling the results of Evans’ and Hoxby’s studies. Hoxby’s decision to group foundation programs, percentage equalizing programs, guaranteed tax base, and guaranteed tax yield programs into one category of SFE programs reflects an implicit assumption that these four approaches are sufficiently similar to treat them as a single approach. My empirical results are consistent with Hoxby’s paper insofar as they provide evidence to support this assumption. Hoxby’s conclusion that implementing SFE programs do not necessarily improve equity in school funding is consistent with my finding that there is no relationship between a state’s basic approach to education funding, and the equitable allocation of education resources.

However, while there is no significant connection between a state’s basic approach to school funding and the equitable allocation of resources, this is not to say that there is not wide variation in the extent to which states provide equal educational opportunity. Indeed, some states have much lower wealth neutrality, targeting scores, and spending variation than others. The data illustrate that a state *can* achieve high levels of equity under an SFE program. When *do* they? Evans’ and Hoxby’s results suggest that states will achieve greater equity in funding when they have reformed the state system under court order.

Combining the results of Evans’ and Hoxby’s study, and my own empirical results yields the following hypothesis: Under the watchful eye of a court, a state can and does produce significantly more equitable funding results (even if it does not change its basic approach to education funding). This is logical when one

68. *Campaign for Fiscal Equity*, 719 N.Y.S.2d at 529-30.

69. In half the years, the percentage for NYC was exactly 38.86%, while in other years the percentage for NYC never deviated by more than .3%. Plaintiffs Brief at ¶¶1840-1855.

considers that plaintiffs and courts will be focusing on the outcomes produced by the reform, not the legislature's description of the new approach. Without judicial oversight, on the other hand, approaches that are generally thought to be more redistributive are in fact no different than the other basic approaches to education finance. The explanation for this is that the legislature is responsible only to the voting public, who may indeed be influenced by the legislature's description of the new, highly progressive approach, even if (and perhaps all the more so because) no actual change occurs in the actual distribution of resources.

V. WHY DO STATES ADOPT DIFFERENT APPROACHES THAT AREN'T REALLY DIFFERENT?

As Carr and Fuhrman have noted, "[a] state's existing school finance system is a product of the legislative process and therefore reflects the state's balance of political power. Changing that system requires a shift of power relationships."⁷⁰ While something like an adverse court ruling may shift these power relationships, in some cases it simply acts as an outside disturbance to a system at equilibrium. The outside force may shift the balance in the short term, but the system will ultimately return to its previous equilibrium state. In the school finance context, this means that while a court decision declaring the education finance system unconstitutional may force the legislature to make immediate changes in the system, subsequent amendments and formula modifications are likely to shift the allocation of resources back to the balance that existed before the court decision.

We have already seen how the allocation of state aid in New York is simply a reflection of a district's political influence over the "three men in the room." Other states, such as Washington, New Jersey, and Vermont, also provide illustrations of political equilibrium at work. In Washington, following substantial reforms in response to a decision in favor of the plaintiffs in a school finance lawsuit, the state drifted slowly back toward its pre-court political equilibrium. In New Jersey, the political equilibrium was so strong that it took several court rulings in favor of plaintiffs and significant judicial activism before the legislature moved toward enacting a more equitable school finance system. And in Vermont, legislation that dramatically equalized the distribution of education resources has been under constant political pressure and is still in danger of being substantially undermined.

A. Washington State

Washington state nominally follows a full state funding approach. In 1974, the Washington Supreme Court rejected a challenge to the state education system that rested on the notion of wealth neutrality.⁷¹ The court held that the state constitution did not guarantee all students the right to an equal education. Four years later, however, in *Seattle School District No. 1 v. State*,⁷² the court did

70. Melissa C. Carr & Susan H. Fuhrman, *The Politics of School Finance in the 1990s*, in EQUITY AND ADEQUACY, *supra* note 4, at 136.

71. *Northshore Sch. Dist. v. Kinnear*, 530 P.2d 178, 182 (Wash. 1974).

72. *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978).

declare the state's education system unconstitutional on the grounds that it did not satisfy the constitutional requirement that the state assume responsibility for funding "basic education" for a "general and uniform system of K-12 public schools."⁷³ The court declared that financial support for basic education must be provided through state, not local, sources.⁷⁴

In response to the *Seattle* decision, the legislature adopted the Basic Education Act of 1977 which provided that the state would provide full funding for basic educational services, without relying on local property tax revenue.⁷⁵ While local districts were permitted under the law to supplement state funding through special levies, the state placed two restrictions on these special levies through the Levy Lid Act. The first restriction was that funds raised through special levies could not be used for any basic educational services. The funds could only be used for enrichment programs that went beyond the basic services provided by the state. The second restriction was that local district levies could not exceed 10% of a district's basic education allocation from the state.⁷⁶ The Levy Lid Act is all that distinguishes Washington's "full state funding" approach from a flat grant.⁷⁷

However, when the Levy Lid Act was passed, some school districts already collected local revenues that exceeded the 10% lid. These districts were given special authorization ("grandfathered") to continue their higher levies. Levy amounts for grandfathered districts were to be reduced gradually so as to eliminate higher levies by 1982. However, the districts that were to be negatively affected by the Levy Lid Act "were among the largest in the state and [they] banded together to get relief."⁷⁸ Over the next fifteen years, the Levy Lid Act was amended eight times (in 1979, 1981, 1985, 1987, 1988, 1989, 1992, and 1993), and the original 10% limit has never been implemented. From a high of 24% in 1977-78, local revenue as a percentage of total education spending (excluding federal aid) declined to only 8% in 1980-81.⁷⁹ Since 1981, however, this percentage has steadily increased to 18.0% in 1997-98.⁸⁰ By 1999, districts were allowed to return to the pre-*Seattle* equilibrium of 24% of their state and

73. *Id.* at 92-96.

74. *Id.* at 95.

75. 1977 ex.s.c 759 (codified as amended at WASH. REV. CODE ANN. §§ 28A.150-200-260 (West 2003)). See also Margaret Plecki, *School Finance in Washington State 1997-98: Emerging Equity Concerns* (1998) (a paper prepared for the annual meeting of the American Educational Research Ass'n).

76. 1977 ex.s.c 325 (codified as amended at WASH. REV. CODE ANN. §§ 84.52.052-054 (West 2003)). See also Plecki, *supra* note 75.

77. See discussion at *supra* note 47 and accompanying text (distinguishing between full state funding approaches and flat grants).

78. Neil Theobald & Faith Hanna, *Ample Provision for Whom? The Evolution of State Control over School Finance in Washington*, 17 J. OF EDUC. FIN. 7, 17 (1991) (internal quotations omitted).

79. Plecki, *supra* note 75.

80. Margaret Plecki, *Washington*, in AMERICAN EDUCATION FINANCE ASS'N, SCHOOL FINANCE PROGRAMS IN THE UNITED STATES AND CANADA, 1997-98, at 2 (1999).

federal allocations.⁸¹

Furthermore, there is no evidence that the restriction on the use of local levy revenue to non-basic education items has been enforced in any way. "Given existing state databases, it is not possible to examine the exact nature of local levy expenditures, as the state does not collect this information [But] anecdotal information from local district sources indicate that the possibility exists that, in some cases, levy dollars might be used to support basic education."⁸²

The result in Washington is that while the state was nominally following a full state funding approach, state funds actually accounted for only 82% of total education spending, and there was greater variation in spending between districts than there was in sixteen other states.⁸³

B. New Jersey

Like Washington, New Jersey faced an early challenge to its education finance system. In 1973, the New Jersey Supreme Court, in *Robinson v. Cahill*,⁸⁴ held that the state's foundation program violated the New Jersey constitutional requirement of providing all students a "thorough and efficient" education.⁸⁵ After hearing further arguments on the question of remedy, the court chose not to "disturb the statutory scheme unless the Legislature fails to enact, by December 31, 1974, legislation compatible with our decision in this case and effective no later than July 1, 1975."⁸⁶ The court also withheld "ruling upon the question whether, if such legislation is not so adopted, the court may order the distribution of appropriated moneys toward a constitutional objective notwithstanding the legislative directions."⁸⁷

Unlike in Washington, however, the New Jersey legislature failed to enact more equitable legislation, despite the court's decision in *Robinson*. After initially extending the deadline before which the legislature was to act,⁸⁸ the court reheard arguments two years after its initial decision. The tone of the opinion on this occasion was notably different, beginning as follows:

The Court has now come face to face with a constitutional exigency involving, on a level of plain, stark and unmistakable reality, the constitutional obligation of the Court to act. Having previously identified a profound violation of constitutional right, based upon default in a legislative obligation imposed by the organic law in the plainest of terms, we have more than once stayed our hand, with appropriate respect

81. WASH. REV. CODE ANN. § 84.52.0531(4) (West 2003). See also Plecki, *supra* note 75.

82. Plecki, *supra* note 75.

83. As measured by the McLoone Index. The coefficient of variation in Washington is greater than that of twelve other states.

84. *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973).

85. *Id.* at 289-98 (citing N.J. CONST., art. 8, § 4, para. 1 (1947)).

86. *Robinson v. Cahill* (Robinson II), 306 A.2d 65, 66 (N.J. 1973).

87. *Id.* at 66.

88. *Robinson v. Cahill* (Robinson III), 335 A.2d 6, 7 (N.J. 1975).

for the province of other Branches of government. In final alternative, we must now proceed to enforce the constitutional right involved.⁸⁹

The court ordered that if the legislature failed to enact a constitutionally acceptable alternative, then state aid would be allocated according to a percentage equalizing approach for the school year 1976-77.⁹⁰

The Legislature responded to this court order by enacting the Public School Education Act of 1975.⁹¹ While the Act withstood an initial, facial challenge, the court noted “[p]arenthetically, . . . that [the question] whether [the 1975 Act] may or may not pass constitutional muster as applied in the future to any individual school district at any particular time, must quite obviously await the event.”⁹²

“The event” came only five years after passage of the Public School Education Act of 1975. As “the disparities in per-pupil spending in the cities versus the suburbs were increasing again,”⁹³ school finance advocates filed *Abbott v. Burke*, challenging the inequitable outcomes of the new state education finance system, as applied to property-poor districts.⁹⁴

The New Jersey Supreme Court first required the plaintiffs to exhaust their administrative remedies in hearings with the state Department of Education.⁹⁵ After six years of administrative proceedings, in which the Commissioner of Education eventually overturned an administrative judge’s determination that the funding system was unconstitutional, the state supreme court considered the case on its merits.⁹⁶ The court overturned the Commissioner and held that New Jersey’s system of education finance violated the state constitution.⁹⁷ Once again, however, the court left it to the legislature to amend the education act or pass new legislation that would “assure that poorer urban districts’ educational funding is substantially equal to that of property-rich districts. ‘Assure’ means that such funding cannot depend on the budgeting and taxing decisions of local school boards. Funding must be certain, every year.”⁹⁸

This time, the legislature responded by passing the Quality Education Act (QEA), which significantly increased the foundation level of spending for all districts, provided supplemental programs for students in the poorest districts, and slowly phased out state aid to the wealthiest districts.⁹⁹ The legislature also passed a \$2,800,000,000 tax increase to pay for increases in education spending

89. *Robinson v. Cahill* (Robinson IV), 351 A.2d 713, 716 (N.J. 1975).

90. *Id.* at 724.

91. c.212, L.1975, N.J.S.A. 18A: 7A-1 to -52, *repealed by* L.1996, c. 138, § 85, *cited in* *Robinson v. Cahill* (Robinson V), 355 A.2d 129, 131 (N.J. 1976) (*per curiam*)).

92. *Robinson V*, 355 A.2d at 131-32.

93. Carr & Fuhrman, *supra* note 70, at 163.

94. *Abbott v. Burke* (Abbott I), 495 A.2d 376 (N.J. 1985).

95. *Id.* at 393-94.

96. *Abbott v. Burke* (Abbott II), 575 A.2d 359 (N.J. 1990).

97. *Id.* at 363.

98. *Id.* at 408.

99. 1990 N.J. Laws 587 (codified as amended at N.J. STAT. ANN. 18A:7D-1 to -37 (West Supp. 1994), *repealed by* L.1996, c.138, § 85).

provided in the QEA. With the support of Democratic Governor Jim Florio, the QEA and tax increase were passed and signed into law within a month.

Before the legislation was enacted, however, the legislature amended the law, passing a revised package called QEA II.¹⁰⁰ This new bill substantially decreased the tax burden and reduced the level of education aid by \$360,000,000. Some observers attributed the "derailing of reforms" to

[w]idespread public opposition to the QEA proposals, the tax increases, and the prospect of increased spending in urban districts After the first QEA and the \$2,800,000,000 tax increase were passed, an anti-tax uprising, led by a grass-roots organization called Hands Across New Jersey, caused the governor's approval ratings to drop 19 points.¹⁰¹

In the 1991 election, many of the Democratic legislators who had supported the QEA were defeated, and the Republicans gained a majority in the state legislature.¹⁰² Two years later, Governor Florio was defeated by a Republican challenger who made a major campaign issue of Florio's efforts to increase taxes to equalize education spending.¹⁰³

At that point, the new governor, Christine Todd Whitman, faced the challenge of reforming the education finance system to comply with the court's latest decision—a 1994 holding that the QEA II failed to meet the constitutional requirements established in *Abbott II*.¹⁰⁴ After initially calling for increased spending to special-needs districts and cuts in state aid to wealthier districts, Governor Whitman was forced to change course lest she suffer the same fate as her predecessor. Wealthy suburban districts mounted strong opposition to any plan that would result in reduced state aid to their schools, and Republican legislative allies of the governor began to call for hearings to re-examine the Commissioner of Education's proposals. Facing such eroding support from her own Republican base, Governor Whitman backed away from her equity proposal and endorsed an adequacy measure that guaranteed a basic level of funding for all districts, but ignored the court's order to equalize spending.¹⁰⁵

In 1997, the New Jersey Supreme Court declared this latest approach unconstitutional and ordered the legislature to increase funding to the state's poorest districts.¹⁰⁶ Following proceedings on remand, in 1998, the court approved a state education finance reform plan in what many expected to be the last chapter in the *Abbott* saga.¹⁰⁷ Only two years later, however, the plaintiffs

100. 1991 N.J. Laws 200, 231 (codified as amended at N.J. STAT. ANN. 18A:7D-1 to -37 (West Supp. 1994), *repealed by* L.1995, c.138, § 85) (amending the QEA to create the QEA II).

101. Carr & Fuhrman, *supra* note 70, at 165.

102. *Id.*

103. *Id.*

104. *Abbott v. Burke* (Abbott III), 643 A.2d 575, 576-80 (N.J. 1994).

105. *See Abbott v. Burke* (Abbott IV), 693 A.2d 417, 421 (1997); Mark Walls, *Wealthy N.J. Districts Assail Spending Categories*, EDUC. WK. (Feb. 22, 1995).

106. *Abbott IV*, 693 A.2d at 421.

107. *See Abbott v. Burke* (Abbott V), 710 A.2d 450, 490 (N.J. 1998) ("[T]his decision should be the last major judicial involvement in the long and tortuous history of the State's extraordinary

were back in court, alleging that the Commissioner of Education had failed to fully implement the proposal that had been approved by the court. While the court refused to find bad faith on the part of the Commissioner, it did agree with the plaintiffs that certain promises had not been kept, and issued yet another judicial order designed to ensure that the students in New Jersey's poorest districts received an equitable education.¹⁰⁸

Thus, the story of school finance reform in New Jersey is that of legislatures and governors who often respond to an inequitable political equilibrium by making changes that maintain an inequitable equilibrium in the allocation of state education aid despite court orders mandating reform. Only through the continued vigilance of school finance plaintiffs representing the state's poor districts, and the state supreme court, have inter-district spending disparities been reduced in New Jersey.

C. Vermont

Although equity reforms enacted in Vermont in 1997 have remained intact to date, substantial pressure exists to repeal them. The state, therefore, remains an interesting one to watch in coming years to see if this pressure will result in the type of backsliding toward an inequitable equilibrium that occurred in Washington and New Jersey.

In 1997, following a decision by the Vermont Supreme Court that the state's education finance system was unconstitutional,¹⁰⁹ the legislature passed a reform law known as Act 60.¹¹⁰ The new law replaced most local property taxes with a uniform, statewide property tax, and established a per-pupil block grant for every district.¹¹¹ Act 60 also established a guaranteed yield component for districts that chose to spend amounts above the base block grant. This latter provision included a recapture provision that required affluent districts to contribute revenue generated above the guaranteed yield to a "sharing pool." Like Washington's Basic Education Act, Act 60 provided for a gradual transition for districts that had been spending well above the basic block grant level.

The sharing pool provision immediately generated strong opposition from residents of the state's wealthier districts. Opponents dubbed the "sharing pool" the "shark pool" and have engaged in a variety of tactics to avoid the law's impact, including filing lawsuits, engaging in civil disobedience, and establishing private foundations.¹¹² Republicans opposed to Act 60 have also used the legislation as a major campaign issue in an effort to unseat members of the

effort to bring a thorough and efficient education to the children in its poorest school districts."); Minorini & Sugarman, *supra* note 9, at 51 (stating that, "[a]t long last, after more than two decades of litigation, the New Jersey battle over school finance equity appears to be over").

108. *Abbott v. Burke* (Abbott VI), 748 A.2d 82 (N.J. 2000).

109. *See Brigham v. State*, 692 A.2d 384, 386 (Vt. 1997).

110. 1997 Vt. Acts and Resolves 60.

111. *Id.*

112. *See Michael A. Rebell & Jeffrey P. Metzler, Rapid Response and Radical Reform: The Story of School Finance Litigation in Vermont*, 31 J.L. & EDUC. 167, 167 (2001).

Democratic majority that support Act 60's passage.

While no reforms of Act 60 have been enacted in the five years since its passage, Republican opponents have gotten closer every year. In 1998, Republicans successfully poured huge sums of money into the campaigns to unseat the two principal authors of Act 60.¹¹³ According to the New York Times Magazine, Democratic Governor Howard Dean saw his approval ratings fall from 62% to 47% in the year following the passage of Act 60.¹¹⁴ In the 2000 gubernatorial campaign, Dean's Republican challenger made Act 60 a central campaign theme, resulting in a proposal by Dean to eliminate the sharing pool.¹¹⁵ And while the Governor retained his office, Republicans gained a majority in the House for the first time in more than a decade and promptly introduced measures to eliminate the sharing pool provisions.¹¹⁶ Even the Democratically-controlled Senate passed measures in 2001 that would have given wealthy districts more time to phase in the sharing pool portion of Act 60. And while no compromise was reached in conference committee, a majority of political observers believe that the issue will not go away.¹¹⁷

The New York story provides strong evidence of the general proposition that state aid reflects the political equilibrium in the state. New Jersey illustrates how difficult it is to shift this equilibrium, even after multiple court victories. Washington demonstrates that even in states where a court ruling shifts the political equilibrium sufficiently to allow legislative school finance reform, there is a tendency for the balance of political power to return to the equilibrium point. And while Vermont has thus far resisted this tendency, it remains to be seen whether a new, more equitable equilibrium point has been reached, or whether it is only a matter of time before the 1997 school finance reforms are substantially undone.

CONCLUSION

A state's basic approach to funding education may have some impact on the nature of funding debates. For example, in states with "full state funding" programs, it may be more difficult politically for legislators to provide only minimal state funds than in states with "flat grant" programs, even though the two approaches are, in fact, almost identical mathematically.¹¹⁸ However, the

113. *Id.* at 183.

114. Elinor Burkett, *Don't Tread on My Tax Rate*, N.Y. TIMES MAG., Apr. 26, 1998, at 44.

115. Christopher Graff, *Governor to Propose Changes to Act 60*, RUTLAND HERALD (July 14, 2000).

116. Bess Keller, *Pressure Mounts for Overhauling Finance Systems*, EDUC. WK. (Feb. 7, 2001).

117. Joetta L. Sack, *Well-to-do Vt. Towns Seeking Relief from Sch. Finan. Law*, EDUC. WK. (June 6, 2001).

118. See *supra* note 48 and accompanying text. Similarly, the language of guaranteed tax base programs suggests that state should choose a hypothetical district (V_s) that has realistic property values, whereas V_s in percentage equalizing programs does not seem to be conceptually tied to anything.

empirical findings presented in this paper, and the examples of New York and Washington, suggest that the type of basic allocation approach that a state adopts is not significantly related to the equitable allocation of education resources in that state.

More research needs to be done in this area. If the state's basic approach to school finance is not related to the equitable allocation of resources, what factors can account for the differences in interdistrict equity found between states? When does a court decision shift political power to create a new equilibrium, and when is it simply a temporary disturbance to a system that will ultimately return to its original equilibrium state? What is the impact of state categorical aid such as money for construction, transportation or districts with high-needs students? A state's measure of local tax base and the incentives associated with using only assessed property value, compared with using a combination of property value and income, also deserves additional research in light of Hoxby's arguments and the significant impact I found this variable to have on horizontal equity, state percentage, and overall spending. Finally, the relationship between the targeting score and state percentage must be better understood to determine whether it is the result of deliberate calculations by legislators, or unintended consequences of poorly understood incentive structures.

The principal lesson to draw from these findings is that legislators, courts, and citizens interested in achieving greater equality of educational opportunity must stay focused on outcome measures rather than on legislative inputs. The results presented in this paper illustrate that it is all too easy for the redistributive goals of a legislative plan to be undermined by modifications, the impact of which may be unclear *ex ante* to even the most sophisticated observer, let alone the average voter. Furthermore, evidence suggests that there is often strong pressure impeding state legislatures from enacting or sustaining school finance reforms that represent meaningful deviation from inequitable equilibriums. Thus, those interested in a permanent shift to a more equitable distribution of education resources must either change the political equilibrium in most states, or rely on courts to impose solutions on resistant legislatures.

APPENDICES

A. Methodology & Data Sources

To evaluate the correlation between a state finance system and the equality of opportunity, horizontal equity, and overall spending, I first collected data on the different features of each state finance system. Much of this data is conveniently collected periodically by the American Education Finance Association in the series "School Finance Programs in the United States and Canada."¹¹⁹ Second, I collected data on the various outcome measures discussed above for each state. Four of these measures—wealth neutrality score, targeting score, coefficient of variation, and McLoone Index—were taken from *Education Week's* annual survey of the states, "Quality Counts," as was a fifth variable, the percentage of overall education spending contributed by the state ("state percentage").¹²⁰ All four outcome measures control for regional cost differences.¹²¹ Finally, the average expenditure per pupil for each state was taken from the U.S. Department of Education's Digest of Education Statistics.¹²²

Once the data were cleaned and appropriate dummy variables created, I used several statistics techniques—including regressions, correlations, difference of means t-tests, Chi-squares, and ANOVA models—to explore the connection between the program variables and the outcome variables. The analysis was done on the statewide level, rather than the district level, though all of the techniques could be done at the district level as well, provided a state variable were included. One limit to using statewide data, however, is that my sample size was limited to fifty. As a result, I have reported only the most robust results; i.e., those that were significant at the 95% level under a variety of control conditions, e.g., whether the state used pupil weighting or not.

119. See AEFA, *supra* note 15; U.S. DEP'T OF EDUC., NAT'L CENTER FOR EDUC. STATS., PUBLIC SCHOOL FINANCE PROGRAMS OF THE UNITED STATES AND CANADA, 1997-98 (1999), at http://nces.ed.gov/edfin/state_finance/StateFinancing.asp (last visited Jan. 26, 2003).

120. See EDUCATION WEEK, *supra* note 34.

121. See *id.*

122. See U.S. DEP'T OF EDUC., NAT'L CENTER FOR EDUC. STATS., DIGEST OF EDUCATION STATISTICS, at <http://www.nces.ed.gov/pubs2002/digest2001/> (last visited Jan. 26, 2003).

B. Classification of 1998-99 Basic Support Programs

Flat Grants	Foundation Programs		Percentage Equalizing	Guaranteed Tax Base / Yield	Full State Funding
Delaware (with separate equalization component)	<i>Required Local Effort</i>	<i>Local Effort Not Required</i>	Rhode Island	Indiana	Hawaii
	Alabama	Arizona		Wisconsin	Washington
	Alaska	Arkansas	Foundation Type		
North Carolina	Colorado	California	<i>Required Local Effort</i>		
	Florida	Idaho	Connecticut		
	Georgia ¹	Illinois			
	Iowa	Kansas	<i>No Local Effort Required</i>		
	Kentucky	Louisiana	New York		
	Maine	Maryland	Pennsylvania		
	Massachusetts	Montana ¹			
	Michigan	Nebraska			
	Minnesota	New Hampshire			
	Mississippi	New Jersey			
	Missouri ²	North Dakota			
	Nevada	Oklahoma ¹			
	New Mexico	Oregon			
	Ohio	South Dakota			
	South Carolina	Vermont			
	Tennessee	West Virginia			
	Texas ¹				
	Utah				
	Virginia				
	Wyoming				
Total = 2	Total = 22	Total = 18	Total = 4	Total = 2	Total = 2

The following states provided descriptions for years other than 1993-94: Colorado—1994-95; Michigan—1994-95; Wyoming—1992-93.

¹ These states have a second tier of GTB / GTY funding in addition to the foundation program.

² Missouri incorporates a GTB add on into the basic support formula.

Adapted from AMERICAN EDUCATION FINANCE ASSOCIATION, PUBLIC SCHOOL FINANCE PROGRAMS OF THE UNITED STATES AND CANADA, 1993-94 (1995) using updates from AMERICAN EDUCATION FINANCE ASSOCIATION, PUBLIC SCHOOL FINANCE PROGRAMS OF THE UNITED STATES AND CANADA, 1998-99 (1999), at http://www.nces.ed.gov/edfin/state_finance/StateFinancing.asp (last visited Mar. 7, 2002).

C. Outcome Variables to Program Classification

*** Analysis of Variance Model ***

Short Output:

Call:

```
aov(formula = State.percentage ~ Program.Classification, data = EdData4,  
     na.action = na.exclude)
```

Terms:

	Program.Classification	Residuals
Sum of Squares	3816.970	7618.471
Deg. of Freedom	5	44

Residual standard error: 13.15854

Estimated effects may be unbalanced

	Df	Sum of Sq	Mean Sq	F Value	Pr(F)
Program.Classification	5	3816.970	763.3941	4.408935	0.002431118
Residuals	44	7618.471	173.1471		

*** Analysis of Variance Model ***

Short Output:

Call:

```
aov(formula = Targeting.Score ~ Program.Classification, data = EdData4,  
     na.action = na.exclude)
```

Terms:

	Program.Classification	Residuals
Sum of Squares	0.194605	1.116842
Deg. of Freedom	5	44

Residual standard error: 0.1593197

Estimated effects may be unbalanced

	Df	Sum of Sq	Mean Sq	F Value	Pr(F)
Program.Classification	5	0.194605	0.03892099	1.533362	0.19912
Residuals	44	1.116842	0.02538278		

*** Analysis of Variance Model ***

Short Output:

Call:

```
aov(formula = Wealth.neutrality ~ Program.Classification, data =  
EdData4,  
     na.action = na.exclude)
```

Terms:

	Program.Classification	Residuals
Sum of Squares	0.0605348	0.6571625
Deg. of Freedom	5	44

Residual standard error: 0.1222109
Estimated effects may be unbalanced

	Df	Sum of Sq	Mean Sq	F Value	Pr(F)
Program.Classification	5	0.0605348	0.01210696	0.8106158	0.5484605
Residuals	44	0.6571625	0.01493551		

*** Analysis of Variance Model ***

Short Output:

```
Call:
  aov(formula = Coefficient.of.variation ~ Program.Classification, data
  =
  EdData4, na.action = na.exclude)
```

Terms:

	Program.Classification	Residuals
Sum of Squares	0.02170629	0.08477723
Deg. of Freedom	5	44

Residual standard error: 0.04389482
Estimated effects may be unbalanced

	Df	Sum of Sq	Mean Sq	F Value	Pr(F)
Program.Classification	5	0.02170629	0.004341258	2.253144	0.06561803
Residuals	44	0.08477723	0.001926755		

*** Analysis of Variance Model ***

Short Output:

```
Call:
  aov(formula = McLoone.Index ~ Program.Classification, data = EdData4,
  na.action = na.exclude)
```

Terms:

	Program.Classification	Residuals
Sum of Squares	0.00652386	0.03493732
Deg. of Freedom	5	44

Residual standard error: 0.02817854
Estimated effects may be unbalanced

	Df	Sum of Sq	Mean Sq	F Value	Pr(F)
--	----	-----------	---------	---------	-------

Program.Classification 5 0.00652386 0.001304772 1.643227 0.1686231
Residuals 44 0.03493732 0.000794030

*** Analysis of Variance Model ***

Short Output:

Call:

aov(formula = Spending.enrollment.1993 ~ Program.Classification, data
= EdData4, na.action = na.exclude)

Terms:

	Program.Classification	Residuals
Sum of Squares	18786497	53401061
Deg. of Freedom	5	44

Residual standard error: 1101.663
Estimated effects may be unbalanced

	Df	Sum of Sq	Mean Sq	F Value	Pr(F)
Program.Classification	5	18786497	3757299	3.095841	0.01764418
Residuals	44	53401061	1213660		

D. Targeting Score to State Percentage

```
*** Linear Model ***

Call: lm(formula = Targeting.Score ~ Flat.grant + Foundation.NLER +
  Percent.Equalizing + GTB.GTY + Full.State + State.percentage, data =
  EdData4, na.action = na.exclude)

Residuals:
    Min       1Q   Median       3Q      Max
-0.2635 -0.07063  0.0002475  0.07806  0.249

Coefficients:
                Value Std. Error t value Pr(>|t|)
(Intercept) -0.5667   0.0768   -7.3830  0.0000
  Flat.grant -0.0052   0.0993   -0.0525  0.9584
Foundation.NLER -0.0536  0.0427   -1.2547  0.2164
Percent.Equalizing -0.0868  0.0714   -1.2150  0.2310
          GTB.GTY  0.0244  0.0954    0.2558  0.7993
      Full.State -0.0886  0.1087   -0.8155  0.4193
State.percentage  0.0074  0.0015    5.0656  0.0000

Residual standard error: 0.1275 on 43 degrees of freedom
Multiple R-Squared: 0.4667
F-statistic: 6.271 on 6 and 43 degrees of freedom, the p-value is
0.00008604
```


E. Spending to State Percentage

*** Linear Model ***

Call: `lm(formula = Targeting.Score ~ State.percentage, data = EdData4, na.action = na.exclude)`

Residuals:

Min	1Q	Median	3Q	Max
-0.2844	-0.07216	0.0149	0.0802	0.2748

Coefficients:

	Value	Std. Error	t value	Pr(> t)
(Intercept)	-0.5778	0.0659	-8.7670	0.0000
State.percentage	0.0070	0.0012	5.9724	0.0000

Residual standard error: 0.1252 on 48 degrees of freedom

Multiple R-Squared: 0.4263

F-statistic: 35.67 on 1 and 48 degrees of freedom, the p-value is 2.762e-007

E. Spending to State Percentage

*** Linear Model ***

Call: `lm(formula = Spending.enrollment.1993 ~ Flat.grant + Foundation.NLER + Percent.Equalizing + GTB.GTY + Full.State + State.percentage, data = EdData4, na.action = na.exclude)`

Residuals:

Min	1Q	Median	3Q	Max
-1548	-674.3	-102.6	568.7	3535

Coefficients:

	Value	Std. Error	t value	Pr(> t)
(Intercept)	6206.2025	639.9355	9.6982	0.0000
Flat.grant	587.4596	827.7010	0.7097	0.4817
Foundation.NLER	-13.1419	356.1774	-0.0369	0.9707
Percent.Equalizing	1884.0380	595.4241	3.1642	0.0029
GTB.GTY	631.1520	795.4205	0.7935	0.4319
Full.State	1021.1693	905.7831	1.1274	0.2658
State.percentage	-25.0802	12.1812	-2.0589	0.0456

Residual standard error: 1063 on 43 degrees of freedom

Multiple R-Squared: 0.3266

F-statistic: 3.476 on 6 and 43 degrees of freedom, the p-value is 0.006866

F. Regression Results

*** Linear Model ***

Call: lm(formula = Spending.enrollment.1993 ~ State.percentage, data = EdData4,
na.action = na.exclude)

Residuals:

Min	1Q	Median	3Q	Max
-1766	-813.8	-238.1	518.9	3263

Coefficients:

	Value	Std. Error	t value	Pr(> t)
(Intercept)	6569.4127	605.8470	10.8434	0.0000
State.percentage	-27.4531	10.7616	-2.5510	0.0140

Residual standard error: 1151 on 48 degrees of freedom
Multiple R-Squared: 0.1194
F-statistic: 6.508 on 1 and 48 degrees of freedom, the p-value is 0.01398

*** Linear Model ***

Call: lm(formula = Wealth.neutrality ~ State.percentage, data = EdData4,
na.action
= na.exclude)

Residuals:

Min	1Q	Median	3Q	Max
-0.5041	-0.02329	0.02653	0.06532	0.1716

Coefficients:

	Value	Std. Error	t value	Pr(> t)
(Intercept)	0.2174	0.0604	3.5985	0.0008
State.percentage	-0.0027	0.0011	-2.5520	0.0139

Residual standard error: 0.1147 on 48 degrees of freedom
Multiple R-Squared: 0.1195
F-statistic: 6.513 on 1 and 48 degrees of freedom, the p-value is 0.01395

*** Linear Model ***

Call: lm(formula = Coefficient.of.variation ~ State.percentage, data = EdData4,
na.action = na.exclude)

Residuals:

Min	1Q	Median	3Q	Max
-0.07571	-0.02872	-0.006402	0.02157	0.2106

Coefficients:

	Value	Std. Error	t value	Pr(> t)
(Intercept)	0.1855	0.0230	8.0487	0.0000
State.percentage	-0.0011	0.0004	-2.7531	0.0083

Residual standard error: 0.04377 on 48 degrees of freedom

Multiple R-Squared: 0.1364

F-statistic: 7.58 on 1 and 48 degrees of freedom, the p-value is 0.00831

F. Regression Results

*** Linear Model ***

Call: lm(formula = Coefficient.of.variation ~ Flat.grant + Foundation.NLER +

Percent.Equalizing + GTB.GTY + Full.State + Avg.enrollment + Attendance + Teacher + Weighting + APV.other + APV.income + APV.all + Hold.harmless + Property.tax.rate.limit + Revenue.limit + General.expenditure.limit + Assessment.increase.limit + Full.disclosure + State.percentage, data = EdData4, na.action = na.exclude)

Residuals:

Min	1Q	Median	3Q	Max
-0.05643	-0.01976	-0.0006848	0.01441	0.1496

Coefficients:

	Value	Std. Error	t value	Pr(> t)
(Intercept)	0.1087	0.0574	1.8929	0.0696
Flat.grant	-0.0262	0.0423	-0.6197	0.5408
Foundation.NLER	0.0175	0.0187	0.9336	0.3591
Percent.Equalizing	-0.0122	0.0351	-0.3467	0.7316
GTB.GTY	-0.0168	0.0433	-0.3867	0.7021
Full.State	0.0199	0.0570	0.3485	0.7303
Avg.enrollment	0.0459	0.0214	2.1410	0.0418
Attendance	0.0619	0.0265	2.3404	0.0272
Teacher	0.0213	0.0282	0.7547	0.4572
Weighting	-0.0045	0.0173	-0.2596	0.7972
APV.other	0.0566	0.0267	2.1194	0.0438
APV.income	0.0470	0.0361	1.3019	0.2044
APV.all	-0.0069	0.0243	-0.2824	0.7798
Hold.harmless	-0.0092	0.0167	-0.5516	0.5859
Property.tax.rate.limit	0.0193	0.0208	0.9270	0.3624
Revenue.limit	-0.0100	0.0169	-0.5928	0.5584
General.expenditure.limit	0.0272	0.0238	1.1431	0.2634
Assessment.increase.limit	-0.0285	0.0214	-1.3307	0.1948
Full.disclosure	-0.0155	0.0180	-0.8641	0.3954
State.percentage	-0.0006	0.0008	-0.7302	0.4718

Residual standard error: 0.04462 on 26 degrees of freedom

Multiple R-Squared: 0.4146

F-statistic: 0.9692 on 19 and 26 degrees of freedom, the p-value is 0.52

4 observations deleted due to missing values

*** Linear Model ***

Call: lm(formula = McLoone.Index ~ Flat.grant + Foundation.NLER + Percent.Equalizing + GTB.GTY + Full.State + Avg.enrollment + Attendance + Teacher + Weighting + APV.other + APV.income + APV.all + Hold.harmless + Property.tax.rate.limit + Revenue.limit + General.expenditure.limit + Assessment.increase.limit + Full.disclosure + State.percentage, data = EdData4, na.action = na.exclude)

Residuals:

Min	1Q	Median	3Q	Max
-0.05292	-0.005611	0.0006508	0.01096	0.03241

Coefficients:

	Value	Std. Error	t value	Pr(> t)
(Intercept)	0.9141	0.0308	29.7006	0.0000
Flat.grant	0.0074	0.0226	0.3270	0.7463
Foundation.NLER	0.0069	0.0100	0.6917	0.4953
Percent.Equalizing	0.0327	0.0188	1.7400	0.0937
GTB.GTY	0.0017	0.0232	0.0744	0.9412
Full.State	0.0038	0.0305	0.1240	0.9023
Avg.enrollment	-0.0193	0.0115	-1.6802	0.1049
Attendance	-0.0419	0.0142	-2.9519	0.0066
Teacher	-0.0325	0.0151	-2.1502	0.0410
Weighting	-0.0070	0.0093	-0.7572	0.4557
APV.other	-0.0193	0.0143	-1.3451	0.1902
APV.income	-0.0320	0.0193	-1.6553	0.1099
APV.all	-0.0053	0.0130	-0.4076	0.6869
Hold.harmless	-0.0140	0.0090	-1.5597	0.1309
Property.tax.rate.limit	0.0067	0.0111	0.6040	0.5511
Revenue.limit	-0.0058	0.0090	-0.6371	0.5296
General.expenditure.limit	-0.0024	0.0128	-0.1891	0.8515
Assessment.increase.limit	0.0015	0.0115	0.1341	0.8943
Full.disclosure	0.0028	0.0096	0.2869	0.7765
State.percentage	0.0008	0.0004	1.9138	0.0667

Residual standard error: 0.02391 on 26 degrees of freedom

Multiple R-Squared: 0.5653

F-statistic: 1.78 on 19 and 26 degrees of freedom, the p-value is 0.08555

4 observations deleted due to missing values

*** Linear Model ***

Call: lm(formula = Targeting.Score ~ Flat.grant + Foundation.NLER + Percent.Equalizing + GTB.GTY + Full.State + Avg.enrollment + Attendance + Teacher + Weighting + APV.other + APV.income + APV.all + Hold.harmless + Property.tax.rate.limit + Revenue.limit + General.expenditure.limit + Assessment.increase.limit + Full.disclosure + State.percentage, data = EdData4, na.action = na.exclude)

Residuals:

Min	1Q	Median	3Q	Max
-0.2347	-0.06511	-0.001199	0.05481	0.2092

Coefficients:

	Value	Std. Error	t value	Pr(> t)
(Intercept)	-0.4342	0.1688	-2.5729	0.0161
Flat.grant	0.0649	0.1242	0.5229	0.6055
Foundation.NLER	-0.0279	0.0551	-0.5063	0.6169
Percent.Equalizing	-0.1237	0.1031	-1.2006	0.2407
GTB.GTY	0.0320	0.1274	0.2515	0.8034
Full.State	0.1014	0.1674	0.6055	0.5501
Avg.enrollment	0.0128	0.0630	0.2032	0.8406
Attendance	0.0513	0.0778	0.6590	0.5157
Teacher	-0.0191	0.0828	-0.2302	0.8197
Weighting	-0.0194	0.0510	-0.3813	0.7061
APV.other	0.0665	0.0785	0.8466	0.4050
APV.income	0.0308	0.1060	0.2908	0.7735
APV.all	0.0422	0.0715	0.5897	0.5605
Hold.harmless	-0.0316	0.0491	-0.6430	0.5258
Property.tax.rate.limit	0.0756	0.0611	1.2368	0.2272
Revenue.limit	-0.0113	0.0496	-0.2269	0.8223
General.expenditure.limit	-0.0156	0.0700	-0.2230	0.8252
Assessment.increase.limit	-0.0543	0.0629	-0.8619	0.3966
Full.disclosure	-0.0938	0.0528	-1.7751	0.0876
State.percentage	0.0048	0.0024	2.0005	0.0560

Residual standard error: 0.1311 on 26 degrees of freedom

Multiple R-Squared: 0.5433

F-statistic: 1.628 on 19 and 26 degrees of freedom, the p-value is 0.123
4 observations deleted due to missing values

*** Linear Model ***

Call: lm(formula = Wealth.neutrality ~ Flat.grant + Foundation.NLER + Percent.Equalizing + GTB.GTY + Full.State + Avg.enrollment + Attendance + Teacher + Weighting + APV.other + APV.income + APV.all +

```
Hold.harmless + Property.tax.rate.limit + Revenue.limit +
General.expenditure.limit + Assessment.increase.limit +
Full.disclosure + State.percentage, data = EdData4, na.action =
na.exclude)

Residuals:
    Min       1Q   Median       3Q      Max
-0.3213 -0.04477 -0.002726  0.04296  0.1998

Coefficients:
                Value Std. Error t value Pr(>|t|)
(Intercept)   0.2981   0.1375     2.1682  0.0395
Flat.grant   -0.0443   0.1012    -0.4383  0.6648
Foundation.NLER -0.0824  0.0448    -1.8367  0.0777
Percent.Equalizing -0.0274  0.0840    -0.3265  0.7466
GTB.GTY      -0.1168   0.1038    -1.1259  0.2705
Full.State   -0.0292   0.1364    -0.2140  0.8322
Avg.enrollment -0.0189  0.0513    -0.3683  0.7156
Attendance   -0.0274   0.0634    -0.4321  0.6692
Teacher      -0.0750   0.0675    -1.1114  0.2766
Weighting    -0.0389   0.0415    -0.9370  0.3574
APV.other    -0.1295   0.0640    -2.0244  0.0533
APV.income   -0.0491   0.0863    -0.5688  0.5744
APV.all       0.0505   0.0583     0.8673  0.3937
Hold.harmless -0.0120   0.0400    -0.3004  0.7662
Property.tax.rate.limit -0.1101  0.0498    -2.2114  0.0360
Revenue.limit  0.0549   0.0404     1.3577  0.1862
General.expenditure.limit -0.1527  0.0570    -2.6789  0.0126
Assessment.increase.limit  0.1347  0.0513     2.6273  0.0142
Full.disclosure  0.0212  0.0430     0.4932  0.6260
State.percentage -0.0011  0.0019    -0.5507  0.5865

Residual standard error: 0.1068 on 26 degrees of freedom
Multiple R-Squared:  0.5658
F-statistic: 1.783 on 19 and 26 degrees of freedom, the p-value is 0.08486
4 observations deleted due to missing values

*** Linear Model ***

Call: lm(formula = Spending.enrollment.1993 ~ Flat.grant + Foundation.NLER
+
Percent.Equalizing + GTB.GTY + Full.State + Avg.enrollment +
Attendance + Teacher + Weighting + APV.other + APV.income + APV.all +
Hold.harmless + Property.tax.rate.limit + Revenue.limit +
General.expenditure.limit + Assessment.increase.limit +
Full.disclosure + State.percentage, data = EdData4, na.action =
na.exclude)

Residuals:
```


Min 1Q Median 3Q Max
-2146 -393.8 -23.57 336 2752

Coefficients:

	Value	Std. Error	t value	Pr(> t)
(Intercept)	5194.4725	1318.8615	3.9386	0.0005
Flat.grant	816.0438	970.5496	0.8408	0.4081
Foundation.NLER	291.7132	430.1792	0.6781	0.5037
Percent.Equalizing	399.7447	805.4616	0.4963	0.6239
GTB.GTY	1253.1723	995.3907	1.2590	0.2192
Full.State	224.3503	1308.3097	0.1715	0.8652
Avg.enrollment	36.6761	492.2866	0.0745	0.9412
Attendance	159.2119	607.8509	0.2619	0.7954
Teacher	851.7083	647.3225	1.3157	0.1997
Weighting	-220.1397	398.2334	-0.5528	0.5851
APV.other	137.7341	613.5390	0.2245	0.8241
APV.income	2182.5871	828.2985	2.6350	0.0140
APV.all	-624.6253	559.0418	-1.1173	0.2741
Hold.harmless	127.5920	383.8395	0.3324	0.7422
Property.tax.rate.limit	171.8510	477.7229	0.3597	0.7220
Revenue.limit	-95.1226	387.6556	-0.2454	0.8081
General.expenditure.limit	857.9966	546.8434	1.5690	0.1287
Assessment.increase.limit	-374.3081	491.8410	-0.7610	0.4535
Full.disclosure	-33.4020	412.7920	-0.0809	0.9361
State.percentage	-16.8522	18.5596	-0.9080	0.3722

Residual standard error: 1025 on 26 degrees of freedom
Multiple R-Squared: 0.6146
F-statistic: 2.182 on 19 and 26 degrees of freedom, the p-value is 0.03258
4 observations deleted due to missing values

*** Linear Model ***

Call: lm(formula = State.percentage ~ Flat.grant + Foundation.NLER +
Percent.Equalizing + GTB.GTY + Full.State + Avg.enrollment +
Attendance + Teacher + Weighting + APV.other + APV.income + APV.all +
Hold.harmless + Property.tax.rate.limit + Revenue.limit +
General.expenditure.limit + Assessment.increase.limit +
Full.disclosure, data = EdData4, na.action = na.exclude)

Residuals:

Min 1Q Median 3Q Max
-22.16 -5.236 -0.2282 4.979 16.8

Coefficients:

	Value	Std. Error	t value	Pr(> t)
(Intercept)	56.3452	8.3331	6.7616	0.0000
Flat.grant	8.7103	9.9233	0.8778	0.3878
Foundation.NLER	3.1555	4.4191	0.7140	0.4813

Percent.Equalizing	6.5040	8.2578	0.7876	0.4378
GTB.GTY	-1.8610	10.3153	-0.1804	0.8582
Full.State	6.3109	13.5118	0.4671	0.6442
Avg.enrollment	-4.4488	5.0324	-0.8840	0.3845
Attendance	-4.1738	6.2516	-0.6676	0.5100
Teacher	2.7555	6.6913	0.4118	0.6837
Weighting	3.7412	4.0662	0.9201	0.3657
APV.other	-0.4588	6.3614	-0.0721	0.9430
APV.income	-20.6997	7.6092	-2.7204	0.0113
APV.all	-6.1196	5.6760	-1.0781	0.2905
Hold.harmless	-2.7821	3.9440	-0.7054	0.4866
Property.tax.rate.limit	1.2437	4.9479	0.2514	0.8034
Revenue.limit	1.4401	4.0102	0.3591	0.7223
General.expenditure.limit	-6.1426	5.5458	-1.1076	0.2778
Assessment.increase.limit	2.5063	5.0772	0.4936	0.6255
Full.disclosure	-0.5365	4.2791	-0.1254	0.9012

Residual standard error: 10.63 on 27 degrees of freedom

Multiple R-Squared: 0.5742

F-statistic: 2.022 on 18 and 27 degrees of freedom, the p-value is 0.04756

4 observations deleted due to missing values

G. Measure of Ability to Pay to Outcome Measures

*** Linear Model ***

Call: `lm(formula = Coefficient.of.variation ~ APV.other + APV.income + APV.all,`

`data = EdData4, na.action = na.exclude)`

Residuals:

Min	1Q	Median	3Q	Max
-0.1123	-0.02842	-0.01033	0.02242	0.1804

Coefficients:

	Value	Std. Error	t value	Pr(> t)
(Intercept)	0.1123	0.0089	12.6755	0.0000
APV.other	0.0242	0.0177	1.3666	0.1784
APV.income	0.0313	0.0177	1.7678	0.0837
APV.all	0.0203	0.0224	0.9040	0.3707

Residual standard error: 0.04605 on 46 degrees of freedom

Multiple R-Squared: 0.08394

F-statistic: 1.405 on 3 and 46 degrees of freedom, the p-value is 0.2534

*** Linear Model ***

Call: `lm(formula = McLoone.Index ~ APV.other + APV.income + APV.all, data = EdData4,`

`na.action = na.exclude)`

Residuals:

Min	1Q	Median	3Q	Max
-0.06585	-0.01334	0.0004481	0.01178	0.06005

Coefficients:

	Value	Std. Error	t value	Pr(> t)
(Intercept)	0.9400	0.0051	184.5998	0.0000
APV.other	-0.0062	0.0102	-0.6106	0.5444
APV.income	-0.0363	0.0102	-3.5685	0.0009
APV.all	-0.0165	0.0129	-1.2803	0.2069

Residual standard error: 0.02646 on 46 degrees of freedom

Multiple R-Squared: 0.2233

F-statistic: 4.409 on 3 and 46 degrees of freedom, the p-value is 0.008293

*** Linear Model ***

Call: `lm(formula = Wealth.neutrality ~ APV.other + APV.income + APV.all, data =`

```
EdData4, na.action = na.exclude)
Residuals:
    Min       1Q   Median       3Q      Max
-0.4486 -0.04093 0.01517 0.05957 0.2284

Coefficients:
              Value Std. Error t value Pr(>|t|)
(Intercept)  0.0719   0.0215     3.3514  0.0016
  APV.other -0.1024   0.0429    -2.3850  0.0213
  APV.income  0.0744   0.0429     1.7335  0.0897
    APV.all  0.0199   0.0543     0.3661  0.7160

Residual standard error: 0.1115 on 46 degrees of freedom
Multiple R-Squared:  0.2029
F-statistic: 3.904 on 3 and 46 degrees of freedom, the p-value is 0.01446
```

```
*** Linear Model ***

Call: lm(formula = State.percentage ~ APV.other + APV.income + APV.all,
data =
  EdData4, na.action = na.exclude)
Residuals:
    Min       1Q   Median       3Q      Max
-27.91 -7.763  1.834  7.428 38.14

Coefficients:
              Value Std. Error  t value Pr(>|t|)
(Intercept)  59.2593   2.4070   24.6198  0.0000
  APV.other   0.7519   4.8139    0.1562  0.8766
  APV.income -23.8481   4.8139   -4.9540  0.0000
    APV.all  -8.7393   6.0892   -1.4352  0.1580

Residual standard error: 12.51 on 46 degrees of freedom
Multiple R-Squared:  0.3708
F-statistic: 9.035 on 3 and 46 degrees of freedom, the p-value is
0.00008168
```

```
*** Linear Model ***

Call: lm(formula = Spending.enrollment.1993 ~ APV.other + APV.income +
APV.all,
  data = EdData4, na.action = na.exclude)
Residuals:
    Min       1Q   Median       3Q      Max
-1761 -634.5 -69.41 591.8 3035
```


Coefficients:

	Value	Std. Error	t value	Pr(> t)
(Intercept)	4728.2348	179.7006	26.3117	0.0000
APV.other	137.9032	359.4012	0.3837	0.7030
APV.income	2037.3257	359.4012	5.6687	0.0000
APV.all	-390.9240	454.6105	-0.8599	0.3943

Residual standard error: 933.8 on 46 degrees of freedom

Multiple R-Squared: 0.4444

F-statistic: 12.26 on 3 and 46 degrees of freedom, the p-value is 5.065e-006

THE CONVERGENCE OF EDUCATION AND LAW: A NEW CLASS OF EDUCATORS AND LAWYERS

SARAH E. REDFIELD*

TELL ME A STORY¹

*The state courts have again decided the constitutionality of the school finance system. The legislature has yet to resolve the matter satisfactorily. School budgets are in jeopardy, personnel will need to be let go in the face of uncertainty . . . or teachers' pay will have to be made equitable state wide . . . The school boards could have known, should have planned?*²

*With the enactment of the sweeping No Child Left Behind Act of 2001, state departments and local education agencies are faced with the actual implementation even as the Federal Department of Education issues its policy guidance and implementing regulations. By anyone's count the bill is over 500 pages and the implications staggering and often immediate.*³ *Notices must go out about teacher*

* Professor, Franklin Pierce Law Center, Concord, New Hampshire; Founder and Chair, Education Law Institute, Franklin Pierce Law Center. Professor Redfield is the author of THINKING LIKE A LAWYER: AN EDUCATOR'S GUIDE TO LEGAL ANALYSIS AND RESEARCH (2002). She can be reached by e-mail at sredfiel@maine.rr.com.

1. When I was writing this article, I asked a handful of my lawyer and educator colleagues to "tell me a story" illustrating my premise that schools would operate more effectively if more educators were trained in the legal context of their work and if more lawyers were more aware of the reality of day-to-day life in schools. One colleague asked, "Where do I begin?" and, indeed, the stories were numerous and salient. Only a few are reproduced here, but as the rest of the article suggests, there are many more.

2. Litigation like this is common and ongoing. While the constitutional interpretation is important, the day-to-day implications for schools are often ill-considered or misunderstood. *See, e.g., DeRolph v. State*, 780 N.E.2d 529 (Ohio 2002), *Tenn. Small Sch. Sys. v. McWherter*, 91 S.W.3d 232 (Tenn. 2002)); Joetta L. Sack, *Court Orders Tennessee To Level Teacher Pay*, EDUC. WK., Oct. 16, 2002, at 17, available at <http://www.edweek.org/lew>; Mary Ann Zehr, *Ohio Court Rejects State School Aid System*, EDUC. WK., Jan. 3, 2003, at 13, available at <http://www.edweek.org>.

3. No Child Left Behind Act (NCLB) of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified at 20 U.S. § 6301 (2002)). The need for educators to be involved in the process by which such laws are made and to understand the implications of both the process and the final results has been illustrated repeatedly in large and small matters. *See, e.g., Joetta L. Sack, "No Child" Law Vies for Scarce State Resources*, EDUC. WK., Jan. 8, 2003, at 16, available at <http://www.edweek.org>. *See generally* Andrew Trotter, *Flagrante Delicto*, 177 AM. SCH. BD. J. 12, 14 (Dec. 1990) (giving examples where knowing enough law to know to call an attorney would be valuable).

qualifications⁴ The school boards could have known?

The professor just posted final grades for the class. She used the student numbers from the registrar, which happen to be social security numbers. The lists are always in alphabetical order. Some of the students complained that their privacy rights have been violated. The professor and registrar should have known?

In a rural town with no noticeable Jewish population, the teacher forbade a young Jewish student's wearing a Star of David, noting that it was a gang symbol. The teacher should have known?⁵

The Titusville school district just settled a case with gay student Timothy Dahle for \$312,000. Dahle, now nineteen, alleged that he had been physically and verbally harassed since sixth grade; the school district claimed Dahle brought the treatment on himself.⁶ The case is eerily like the million-dollar case brought by James Nabozny against his Wisconsin school district in 1997.⁷ The Pennsylvania district should have known?

The lawsuit alleged that the principal failed to report a child abuse situation of which she had been informed. A teacher alleged that she had informed the principal about the abusive situation in a hallway conversation. The lawyer should have known? The teacher?

Luke, a middle school student not classified as a student with disabilities, wore an obscene T-shirt in class, and when told to wear it inside out, lost his temper and lashed out at the teacher. The principal suspended Luke for ten days (making Luke's total for the year to date thirteen days). Luke's parents asked for the school records on the incident and other disciplinary incidents involving their son and other students, the parents having previously indicated to the school that they were seriously concerned about their son's inability to control his emotions. Someone should have known?

4. See, e.g., 20 U.S.C. §§ 6311(h)(4) (2002).

5. See *Doodles Don't Look Dangerous*, TIMES PICAYUNE (New Orleans), Aug. 23, 2000, at 6. See generally *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659 (S.D. Tex. 1997) (ruling it was unconstitutional to prohibit wearing rosary outside of clothing); *City of Harvard v. Gaut*, 660 N.E.2d 259 (Ill. App. Ct. 1996) (holding gang ordinance overbroad which included six-pointed star, worn as gang symbol).

6. *Dee McAree, Gay Student Settles Harassment Suit*, NAT'L L.J., Feb. 11, 2002, at A6; *School District Settles*, PITT. POST GAZETTE, Jan. 18, 2002, at B-9.

7. *Nabozny v. Podlesney*, 92 F.3d 446 (7th Cir. 1996); see also *Sexual Harassment in Public Schools: Speeches from the 2000 HWLJ Symposium*, 12 HASTINGS WOMEN'S L.J. 123, 137 (2001) [hereinafter *Sexual Harassment in Public Schools*].

Most of these short stories are fairly simple. Several illustrate some simple legal principles, the knowledge of which could have saved the schools involved substantial amounts of money, not to mention time, resources, and peace of mind.⁸ Others illustrate some simple school contextual realities that would alert attorneys to factual and legal concerns. There are of course more complicated stories, like the last obscene T-shirt scenario that highlights constitutional Due Process⁹ and First Amendment¹⁰ concerns arising under the Individuals with Disabilities Education Act (IDEA)¹¹ and the Family Educational Rights and Privacy Act (FERPA).¹²

INTRODUCTION: NEW CLASS

As the preceding stories suggest, sometimes knowing a few basics is all that is called for; sometimes knowing when to call for expert advice is the answer; sometimes knowing the school culture and practice offers the clue to resolution. For educators and their attorneys to have the requisite information and knowledge, there is a need to define a new class of educators and a new class of lawyers, each attuned to the contextual reality of the other's discipline.¹³ Such a new class will establish law-informed educators and leaders who can act preventively to avoid or minimize legal entanglements and proactively to influence both litigation strategy and government policy. Such a class will also establish education-informed lawyers, apprised of both school practices and important educational research and policies, who can work collaboratively and preventively with their clients.

Support for a call for a new class of lawyers and educators is provided by a

8. See *infra* notes 78-79 and accompanying text (discussing frustration with legal concerns). See generally *Limiting Your School's Exposure to Negligent Supervision and Safety Claims* (John W. McIlveen ed., LRP Publications 2001) [hereinafter *Limiting Your School's Exposure*].

9. U.S. CONST. amend. XIV, § 1; see also *infra* note 43. See generally *Goss v. Lopez*, 419 U.S. 565 (1975) (examining constitutional due process).

10. See U.S. CONST. amend. I; *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (holding that symbolic black armbands cannot be prohibited absent disruption); *Catorina ex rel. Rewt v. Madison County Sch. Bd.*, 246 F.3d 536 (6th Cir. 2001) (finding T-shirts with confederate flag protected speech under *Tinker*, school suspension under dress code remanded); *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465 (6th Cir. 2000) (upholding school suspension for refusing to remove Marilyn Manson T-shirt); *Chambers v. Babbitt*, 145 F. Supp. 2d 1068 (D. Minn. 2001) (finding plaintiffs likely to prevail on "Straight Pride" T-shirt); see also *infra* note 43.

11. 20 U.S.C. § 1400 (2000).

12. *Id.* § 1232g.

13. The terminology "new class of lawyers, new class of educators" was coined in an interview with Dr. William C. Bosher, Dr. R. Daniel Norman, Dr. Richard Vacca, & Kate Kaminsky, Esq., Commonwealth Educational Policy Institute (CEPI), Richmond, VA. Dr. Bosher, Director of CEPI, and Dr. Norman, Deputy Director of CEPI, have served as State Superintendent and Assistant Superintendent of Public Instruction for the Commonwealth of Virginia. Interview with CEPI, Richmond, VA (Oct. 29, 2001) [hereinafter CEPI interview].

review of the current situation in education law and by an analysis of the difficulties presented by this reality. This paper addresses the convergence of education and law in four parts: 1) the growth of the field of education law; 2) the increasing difficulties caused for schools by such growth; 3) the institutional infrastructure that contributes to such difficulties; and 4) the advantages of reformed structures and relationships.

In Part I, Growth, Complexity, Convergence, this paper outlines the extensive increase in the sources and scope of education law¹⁴ since the Supreme Court found "separate but equal" inherently unequal in *Brown v. Board of Education*.¹⁵ Part I also discusses the ways in which such an increase has caused a convergence between the law and education on many of the significant issues forming the legal context of schools today.

Part II, Too Much Law, focuses on the difficulties caused by this growth and convergence. It recognizes evidence of instances where the law is overbearing and where the presence or threat of law and litigation causes educators to make unnecessary or inappropriate decisions. Part II also recognizes areas where what lawyers "don't know" causes them to make decisions that hurt their clients.

In an effort to understand why educators do not know more about the legal context and vice versa, Part III of this paper, Issues of Infrastructure, reviews the current national and state standards for educators focusing (or not) on the requirements for knowledge of the legal context in which educators work. Part III also briefly surveys the current school law offerings in schools of education and in law schools. This part concludes that the current regime is neither clear nor direct, observing that the academic disciplines which nurture educators and lawyers do not readily offer interdisciplinary opportunities for professionals. This paper finds that the current status of educating educators and lawyers about education and law issues is not serving either community well.

Part IV of the paper, A New Class, discusses the advantages of law-informed educators and education-informed attorneys. Drawing examples from existing school and court practices, this part highlights improvements to the difficulties delineated in Part II. In its conclusion, this paper recaps the reasons it is important for the educational community to be law-informed and analogously suggests that in order for school lawyers and other advocates involved with education issues to appropriately represent their clients, they must be education-informed. Noting the advantages of a new class of law-informed educators and education-informed lawyers, this paper advocates a serious, interdisciplinary approach to law and education with increased attention to the subject, and with mutual and cross-training. The Conclusion, Tell Me a New Story, observes that the results will be good for educators, education leaders, child advocates, and the lawyers who represent them—and thus good for students and their

14. Education law includes the various sources of law (legislative, administrative, and judicial, as well as related secondary sources) dealing with schools Pre-K-16 and beyond. It encompasses education-specific enactments and decisions, as well as labor, tort, First Amendment, family, juvenile, and civil rights law as they arise in a school context.

15. 347 U.S. 483 (1954), *rev'd*, *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

schools—which offers a better story, or at least a better ending, than suggested by those at the outset.

I. GROWTH, COMPLEXITY, CONVERGENCE

A review of the burgeoning field of education law begins with the Supreme Court's decision in *Brown v. Board of Education* and its potent acknowledgment of the government's role in education:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.¹⁶

Brown reminds us of the central role law has played in American education. In speaking of the effects of segregation in *Brown*, the Court particularly observes that the manner in which children are educated “may affect their hearts and minds in a way unlikely ever to be undone,” and that the “impact is greater when it has the sanction of the law.”¹⁷

Almost fifty years later, a sampling of current headlines show that the impact and sanction of law are equally present today:

- *Students Accuse High School Of Censoring Yearbook, Sue District*¹⁸
- *Ex-Student Sues State in Rapes at Deaf School*¹⁹
- *SJC Rules School's Search of Student Was Not Legal*²⁰
- *Ex-Coach Joining School Lawsuit—Student Claims Officials Ignored Sexual Abuse*²¹
- *Honors Student's Suit against Putnam School Officials Tossed*²²
- *Students Balk at Being Searched for Guns—A Los Angeles Case Involving A School's Procedures May Clarify Lawsuits Nationwide*²³

16. *Id.* at 493-94.

17. *Id.* at 494.

18. SAN DIEGO UNION & TRIB., Aug. 30, 2001, at A5, available at 2001 WL 6481455.

19. PORTLAND OREGONIAN, Aug. 17, 2001, at B02, available at 2001 WL 3611389.

20. Kathleen Burge, BOSTON GLOBE, Aug. 11, 2001, at B3, available at 2001 WL 3946488.

21. Dawn Marks, DAILY OKLAHOMAN, July 19, 2001, at 3A, available at 2001 WL 24250907.

22. Lawrence Messiner, CHARLESTON GAZETTE & DAILY MAIL (W. Va.), July 11, 2001, at 5A, available at 2001 WL 6678009.

23. Daniel B. Wood, CHRISTIAN SCI. MONITOR, June 26, 2001, at 2, available at 2001 WL

- *Star Former Teacher Sued by Victim of Advances—Sexually Abused Female Student Also Sues School*²⁴

Just a few months of summer newspapers yielded these headlines, reminders of just how present law is in our schools—as sanction, as incentive, as director, and as arbiter. The subjects are as diverse as the numbers are great—religion, homosexuality, Internet use and abuse, censorship, violence, students' and teachers' rights, discrimination, curriculum, negligence, malpractice, assessment, adequacy, equity, and on and on. We even litigate about whether there is authority for schools to hire lawyers and for whom those lawyers work.²⁵

As the previous headlines and the opening stories suggest, the legal issues confronting schools are legion. The number of lawsuits against schools is increasing dramatically. In 1960, the education law reporters published some 300 suits with schools named as parties; in 1970, it was about 700; and by 2000, over 1800.²⁶ In 2001, there were a hundred federal court cases addressing just IDEA.²⁷ Reported numbers for jury verdicts and judgments against schools show similar increases.²⁸ And of course, these numbers do not begin to encompass unreported cases and settlements, or the far greater number of other legal issues resolved in law offices every day.²⁹

The amount of legislation and regulation affecting schools has increased at an equally striking pace. In gross terms, sheer page numbers make the point.³⁰ Title 20, the education title of the United States Code, today occupies ten

3736273.

24. Bob Morrow, PEORIA J. STAR, June 29, 2001, at B02, available at 2001 WL 7628212.

25. See, e.g., Rathmann v. Bd. of Dirs. of Davenport Cmty. Sch. Dist., 580 N.W.2d 773 (Iowa 1998).

26. These numbers are illustrative of a trend, but admittedly a superficial count. They were obtained by searching the West Education Reporter for cases with school, college, or university in their titles. Of course, there are many more cases that involve these parties and school issues where the words do not appear in the title. A search in the text of cases for these same terms produces about twice the numbers. Nor do these numbers include unpublished, settled, or pending litigation. See Cindy Collins, *Public Education Law . . . Complex Social Issues Drive Growth of Education Law Practice*, 17 NO. 7 COUNS. 16 (1998); Todd A. DeMitchell, *The Educator & Tort Liability: An In-Service Outline of a Duty Owed*, 154 EDUC. L. REP. 417, 420 n.2 (2001). But see Perry A. Zirkel, *The "Explosion" in Education Litigation: An Update*, 114 EDUC. L. REP. 341, 351 (1997) (suggesting a plateau in litigation in 1980s and 1990s).

27. This number is only an estimate based on a search of LRP's *Individuals with Disabilities Educ. L. Rep.* See Mitchell L. Yell & Antonis Katsiyannis, 45 PREVENTING SCHOOL FAILURE 82, 83 (2001) ("There is, perhaps, no area of educational law that has been more highly litigated than the education of students with disabilities."); *Please Miss, What's an IEP?*, ECONOMIST, June 8, 2002, at 31 (majority of recent lawsuits are special education).

28. For example, the LRP Jury Verdict and Judgment directory reported one such verdict in 1989, and 232 by 2001.

29. See, e.g., JAMES A. RAPP, EDUCATION LAW § 1.02 (2001).

30. This is also a superficial method of gauging the increase, but provides some general indication.

volumes. Education did not occupy its own title in the Code of Federal Regulations until 1981, when it encompassed about 1000 pages. Title 34 of the Code of Federal Regulations is now three fat volumes totaling some 2000 pages.³¹ This year, as in the past, Congress, state legislatures, and executive agencies across the country added heavily to this volume of law and regulations as they sought to achieve adequate education and effective school reform.³² The Bush administration's education bill, No Child Left Behind, is itself some 500 pages.³³

In addition to sheer volume, it is noteworthy that virtually all sources of law in this area are subject to substantial, if not constant, change. In this legal area, the Supreme Court has overruled its precedent; this has recently been true in the area of religion,³⁴ and also is true of other legal issues impacting schools.³⁵ In the 2001-2002 Supreme Court term alone, several education-related cases were decided³⁶ and an even larger number sought high court review.³⁷ Education law is also an area where Congress and governmental agencies are continuously evolving their positions. The change contemplated by the No Child Left Behind

31. Like the method for measuring cases, these page numbers are only a superficial illustration to give a sense of the increase.

32. See, e.g., Gary R. Thune, *Was That a Red Flag? The Importance of Working Effectively With Your School Attorney in a Litigious Age*, AASA: The School Administrator Web Edition (Nov. 1997), at http://www.aasa.org/publications/sa/1997_11/thune.htm (last visited Oct. 21, 2001).

33. No Child Left Behind Act (NCLB) of 2001, Pub. L. No. 107-110, 115 Stat 1425 (codified at 20 U.S.C. § 6301 (2002)).

34. See, e.g., *Mitchell v. Helms*, 530 U.S. 793, 835 (2000), *overruling* *Meek v. Pittenger*, 421 U.S. 349 (1975) and *Wolman v. Walter*, 433 U.S. 229 (1977); *Agostini v. Felton*, 521 U.S. 203, 236 (1997), *overruling* *Aguilar v. Felton*, 473 U.S. 402 (1985) and *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985). Further development of the religion/school precedent is offered by the recent voucher cases, including *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (holding that Ohio's Pilot Project Scholarship Program for school vouchers does not violate Establishment Clause of First Amendment).

35. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), *rejecting* *Plessy v. Ferguson*, 163 U.S. 537 (1896) (establishing separate but equal doctrine); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), *overruling* *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940) (regarding mandatory flag salute); see also *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 663 (1998), *overruling* *Monroe v. Pape*, 365 U.S. 167 (1961) (regarding municipal liability).

36. *Bd. Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822 (2002) (holding that drug testing students of any extra-curricular activity does not violate Fourth Amendment); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (concluding Ohio's Pilot Project Scholarship Program for school vouchers does not violate Establishment Clause of First Amendment); *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (finding no private right of action under FERPA); *Owasso Indep. Sch. Dist. No. 1-011 v. Falvo*, 534 U.S. 426 (2002) (holding that peer grading of classwork does not violate FERPA).

37. See generally National School Boards Association, *Pending Supreme Court School Cases*, at <http://www.nsba.org/cosa/chart.htm> (last visited Feb. 2, 2002).

legislation is expansive and illustrative.³⁸ Special education is another prime example. The regulations³⁹ adopted to implement the 1997⁴⁰ reauthorization of IDEA still seem like “new rules” to many, even as the next reauthorization approaches.⁴¹ Not surprisingly, the number of education lawyers is also on the rise.⁴²

II. TOO MUCH LAW

These growing and evolving sources of law, together with the opening stories and headlines, imply both how closely entangled law is in the everyday life of schools and how quickly the legal context may stretch and change. The impact of these evolving sources of law on institutional structure and decision-making is significant.⁴³ Here, to many, the numbers suggest that there is simply too much

38. No Child Left Behind Act (NCLB) of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified at 20 U.S.C. § 6301 (2002)).

39. See 34 C.F.R. § 300 (2001) (proposed in 1997 at 62 Fed. Reg. 55,026 and finally adopted in 1999 at 64 Fed. Reg. 12,406).

40. Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17 (1997).

41. See Reauthorization of the Individuals with Disabilities Education Act, 67 Fed. Reg. 1411 (2002).

42. See, e.g., Robert D. Bickel, *The Role of College or University Legal Counsel*, 3 J.L. & EDUC. 73, 77 (1974); Roderick K. Daane, *The Role of University Counsel*, 12 J.C. & U.L. 399, 399 (1985); Peter H. Ruger, *The Practice and Profession of Higher Education Law*, 27 STETSON L. REV. 175 (1997). See generally Peter S. Popovich, *Education Law Public and Private*, 44 EDUC. L. REP. 927 (1988) (commenting on the increase in education law treatise and textual material).

43. This paper focuses on the involvement of school law with schools in their institutional and administrative capacities. This involves another whole set of reasons why educators should know that the law revolves around the idea that schools are institutions which convey society's democratic values and principles of citizenship. See, e.g., *Campaign for Fiscal Equity v. New York*, 744 N.Y.S.2d 130 (App. Div. 2002) (attempting to define New York's “sound basic education” requirement in part by reference to voting and civic responsibility). Schools teach and exemplify these important values, and for them to do so well requires that those involved with the schools be informed of the leading court cases of the day. See generally Sarah E. Redfield, *Should We Teach the Teachers: Why Educators Need to Know the Law*, Legal Issues in Education, ORBIT MAG. (2002). By way of example, the classic United States Supreme Court opinion in *Goss v. Lopez*, 419 U.S. 565 (1975), held that before a student could be suspended from school for more than ten days, he or she had to be given notice of the reasons for the suspension and an opportunity to respond. *Goss* thus set the minimum standard for fair process for school discipline. In defining terms, the Supreme Court did in *Goss* what the Supreme Court does best—think of *Brown v. Board of Education*—that is, set a standard for constitutional principles to be incorporated into society, in this case into schools. Similarly, in *Tinker v. Des Moines Community School District*, 393 U.S. 503 (1969), the Court set the societal parameters for student freedom of speech by recognizing that neither students nor teachers “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate” and holding that the prohibition of wearing black armbands to protest the

law in schools. This appears to be true of all schools and all manner of government involvement—constitutional, statutory, regulatory, and judicial. To others, law and activist plaintiff litigators appear to deserve the credit for opening access to education. Lawyers, through litigation and subsequent legislation, have been in the forefront of the movement to achieve and assure educational benefits for those children previously unserved or underserved.⁴⁴ It was the *Brown* litigation that made school desegregation the law of the land,⁴⁵ litigation that brought focus to the exclusion of disabled children,⁴⁶ litigation that focused on the needs of immigrant children,⁴⁷ litigation that called attention to educational funding disparities of constitutional proportion,⁴⁸ and litigation that continues to

Vietnam War was unconstitutional “without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline.” *Id.* at 506, 511; *see also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (asserting that school newspaper, activities with school imprimatur can be more closely regulated); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (regarding lewd speech student assembly); Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982) (regarding removal of books from library).

44. *See generally* LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY 9-17 (Jay P. Heubert ed., 1998) [hereinafter LAW AND SCHOOL REFORM].

45. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *see also* Milliken v. Bradley, 433 U.S. 267 (1977) (citing remedial education plans and state funding upheld); Gary Orfield, *Conservative Activists and the Rush Toward Resegregation*, in LAW AND SCHOOL REFORM, *supra* note 44, at 39 (“No major urban school district except Seattle complied with the constitutional requirement for desegregation until it was ordered to do so, even when the law was perfectly clear.”).

46. *See* Mills v. Bd. of Educ. of the District of Columbia, 348 F. Supp. 866 (D.D.C. 1972) (regarding mentally retarded, hyperactive, emotionally and behaviorally disturbed children); Pa. Ass’n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972) (examining retarded children); *see also* Labanks v. Spears, 60 F.R.D. 135 (E.D. La. 1973) (examining Louisiana consent decree regarding mentally retarded children); Wolf v. Legislature of Utah, Civ. No. 182646 (3d Dist. Utah 1969), referenced in Dennis E. Cichon, *Educability and Education: Filling the Cracks in Service Provision Responsibility Under the Education for All Handicapped Children Act of 1975*, 48 OHIO ST. L.J. 1089 (1987) (promoting students with trainable IQ levels to be in public school following *Brown*-type analysis). *But see* Beattie v. Bd. of Educ., 172 N.W. 153 (Wis. 1919) (upholding exclusion of student with cerebral palsy, which did not impact student’s intellect).

47. *See* Plyler v. Doe, 457 U.S. 202 (1982) (examining alien children to be educated); *see also* Lau v. Nichols, 414 U.S. 563 (1974) (concerning bilingual education).

48. *Compare* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (holding that education is not a fundamental right under Federal Constitution, funding disparities not subject to strict scrutiny), with *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989) (concluding school finance system to be unconstitutional under state constitutional provisions). *See generally* John Dayton, *Serrano and Its Progeny: An Analysis of 30 Years of School Funding Litigation*, 157 EDUC. L. REP. 447 (2001). However, individual state challenges will not address inequality across states or inequality compounded by federal grant/formula funding under statutes such as IDEA or the Equal Educational Opportunity Act. Molly S. McUsic, *School Finance*, in LAW AND SCHOOL REFORM, *supra* note 44, at 94-97; *see also* No Child Left Behind Act (NCLB) of 2001, Pub. L. No.

resolve questions of reform.⁴⁹ From these judicial roots have come the cases, laws, standards, and directions that have moved law and education to the unified place they occupy today.⁵⁰

Regardless of the perspective one has on law—too much or only too valuable, incremental or radical—its presence in education is the reality. As one commentator stated, “In our contemporary political and social environment law has become a primary means of implementing change and a stabilizing force for promoting incremental rather than radical reform in the provision of public education.”⁵¹

Writing five years ago in the *Harvard Educational Review*, educator and lawyer Jay Heubert called for more collaboration between educators and their lawyers to address the growing long-term involvement of law in schools.⁵² Recognizing that there is an “increasing convergence of legal standards and educational norms,” Heubert noted:

There are now many areas of education law in which legal standards and educational principles are intertwined. Under the First Amendment, for example, public school officials may determine the content of the curriculum and of school-sponsored newspapers and assemblies, as long as the educators can show that their decisions were “reasonably related to a valid pedagogical concern” (*Hazelwood School District v. Kuhlmeier*, 1988). In these and many similar situations, it takes a lawyer to know what the legal standard is and an educator to know whether that education-based standard has been met. In sum, it is increasingly the case that neither lawyers nor educators can do their work

107-110, 115 Stat. 1425 (codified at 20 U.S.C. § 6301 (2002)), particularly Title I, Improving the Academic Achievement of the Disadvantaged.

49. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

50. Writing in the late 1980s, Professor David Kirp observed that, since the Supreme Court’s decisions in *Brown* and *Goss*, the country has been moving steadily away from primarily local, political control of schools to “centralization and legalization.” DAVID L. KIRP & DONALD N. JENSEN, *SCHOOL DAYS, RULE DAYS: THE LEGALIZATION AND REGULATION OF EDUCATION* 1-2 (1986); see also PHILLIP C. SCHLECHTY, *SHAKING UP THE SCHOOL HOUSE* 14-18 (2001) (focusing on discussion of more government involvement in schools); Lawrence W. Friedman, *The Rise and Fall of Student Rights*, in KIRP & JENSEN, *supra*, at 251 (discussing the judicialization of schools); D.M. Sacken, *The Legalization of Education and the Preparation of School Administrators*, 84 EDUC. L. REP. 1, 7 (1993).

51. Joseph Beckham, *Meeting Legal Challenges*, in THE SCHOOL LEADER’S LIBRARY: LEADING FOR LEARNING SERIES, at xiii-xiv (1996); see also Joseph R. McKinney & Theodore L. Drake, *The School Attorney and Local Educational Policy-Making*, 93 EDUC. L. REP. 471, 481 nn.1-5 and accompanying text (1994); Philip M. Corkill & J. Robert Hendricks, *Learning the Law and Loving the School Attorney Less*, The School Administrator Web Edition (Nov. 1997), at http://www.aasa.org/publications/sa/1997_11/corkill.htm (last visited Oct. 21, 2001).

52. Jay P. Heubert, *The More We Get Together: Improving Collaboration Between Educators and Their Lawyers*, 67 HARV. EDUC. REV. 531 (1997).

independently.⁵³

The opening stories and headlines certainly suggest many more areas of the intertwined expertise Heubert delineates. Each raises a significant area of convergence between law and education where “neither lawyers nor educators can do their work independently.”⁵⁴ The questions are large and multidisciplinary. What is a valid pedagogical concern as it relates to constitutionally protected student speech? What level of actual or potential school disruption is required to justify the inhibition of students’ constitutionally defined free speech?⁵⁵ What is sufficient interference with school discipline or harmony to justify interference with a teacher’s speaking out on school policy?⁵⁶ How much school involvement qualifies as an “impermissibly coercive” endorsement of religion?⁵⁷ What intrusion is justified at its inception and reasonable in its scope when school officials search students?⁵⁸ What is deliberate indifference to harassment in schools?⁵⁹ What level of bilingual

53. *Id.* The internal quotation is from *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 271-72 (1988).

54. Heubert, *supra* note 52.

55. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

56. *See Pickering v. Bd. of Educ. of Township High Sch. Dist.* 205, 391 U.S. 563, 570 (1968) (holding that teacher who criticized Board and superintendent in local newspaper regarding proposed tax increase was dismissed in violation of First Amendment because teacher was speaking on matter of public concern).

57. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (holding that student-led, student-initiated invocations prior to football games did not amount to private speech and the school’s policy of permitting such invocations was impermissibly coercive); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (asserting that state statutes to be unconstitutional under First Amendment because both involved excessive entanglement of state with church because the state had direct control over the way funds were used by religious schools); *Adler v. Duval County Sch. Bd.*, 250 F.3d 1330 (11th Cir.), *cert. denied*, 534 U.S. 1065 (2001) (concluding that school system’s policy of permitting a graduating student, elected by her class, to deliver an unrestricted message of her choice at graduation was not facially violative of the Establishment Clause).

58. *See New Jersey v. T.L.O.*, 469 U.S. 325, 341-42 (1985) (“Determining the reasonableness of any search involves a twofold inquiry: first, one must consider ‘whether the . . . action was justified at its inception,’ . . . second, one must determine whether the search as actually conducted ‘was reasonably related in scope to the circumstances which justified the interference in the first place.’”); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (upholding random urinalysis of student athletes); *see also Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822 (2002); *infra* notes 68-72 and accompanying text.

59. *See, e.g., Title IX*, 20 U.S.C. § 1681 (2000); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 648 (1999) (“School administrators will continue to enjoy the flexibility they require so long as funding recipients are deemed deliberately indifferent to acts of student-on-student harassment only where the recipient’s response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.”); *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253, 261 (6th Cir. 2000).

training and instruction is adequate?⁶⁰ At what point should teachers and school administrators be held to have known the law and be subjected to liability?⁶¹ What qualifies as educational benefit in special education?⁶² What accommodation is a fundamental alteration of the essence of an academic program?⁶³ Or, to ask the conclusory questions, what is an adequate or appropriate (both now legal terms of art⁶⁴) education and what methods are

Where a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior. Where a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances.

Id.

60. See, e.g., Equal Educational Opportunity Act of 1974, 20 U.S.C. § 1703(f) (1999); see also *Castaneda v. Pickard*, 648 F.2d 989, 1012-13 (5th Cir. 1981) (determining that bilingual education program was inadequate without appropriate personnel).

61. Basic Supreme Court principles of immunity were derived from cases other than education cases. E.g., *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (defining the reasonable person aspect of the test to be objective in light of clearly established law and the information possessed); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (finding immunity for government officials whose conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known). But immunity principles are relevant to school litigation. See, e.g., *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821 (11th Cir.), *cert. denied*, *Jenkins v. Herring*, 522 U.S. 966 (1997) (finding school officials qualified as immune in a strip search of eight-year-olds for seven dollars).

62. See, e.g., IDEA, 20 U.S.C. § 1400-1487; *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 189 (1982) ("free appropriate public education" satisfied when student benefits educationally).

63. See, e.g., Rehabilitation Act of 1973, particularly Section 504, 29 U.S.C. § 794 (2000); 34 C.F.R. § 104 (2001); the Americans with Disabilities Act, 42 U.S.C. § 12101-12213 (1995), particularly 42 U.S.C. § 12132; *S.E. Cmty. Coll. v. Davis*, 442 U.S. 397, 405 (1979) (finding college not required to affirmatively modify nursing program to eliminate need for oral communication); *Stern v. Univ. of Osteopathic Med. & Health Sci.*, 220 F.3d 906, 908 (8th Cir. 2000) (student not entitled to requested accommodations without showing they would qualify him for medical school); *Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141 (1st Cir. 1998) (private school need not exempt student from its discipline plan to provide "reasonable accommodation" for student with attention deficit-hyperactivity disorder, oppositional defiant disorder, and depression).

64. See, e.g., as to a "free appropriate public education," IDEA, 20 U.S.C. § 1401(8), which provides:

The term "free appropriate public education" means special education and related services that—(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

Id. Or for one of the numerous examples where state courts discuss an adequate education, see

acceptable to achieve reform?⁶⁵

Questions like these have their genesis in federal and state constitutions, statutes, and case law, but the answers cannot and do not lie there alone. Courts do not want to substitute their judgment for that of state policy makers,⁶⁶ nor do they want to be arbiters of educational methodology and pedagogy.⁶⁷ As such questions are raised, the answers will lie where law, education, astute pedagogy, and school administration intersect—that is, when lawyers and educators work dependently, not independently.

The free speech questions offer one example. It is a teacher and principal who can best predict the likelihood of substantial disruption by student speech, and a principal or superintendent who can best understand the impact of critical teacher speech on the school work environment. The school search cases provide a second example of this point. In *New Jersey v. T.L.O.*,⁶⁸ the United States Supreme Court defined the constitutional standard for school searches as justified at the inception, reasonable in scope.⁶⁹ In *Vernonia 47J v. Acton*,⁷⁰ the Supreme Court expanded its views regarding drug testing student athletes;⁷¹ in *Board of Education of Independent School District No. 92 v. Earls*,⁷² the Supreme Court set the standard for drug testing students in other extracurricular activities.⁷³ Under these precedents, lawyers can and will articulate the judicial standards, but educators must provide the factual reality. It is the teacher and school administrators who can best define the justification for a search, and who can best know what is reasonable in scope given the item sought and the age and other characteristics of the students and school milieu.⁷⁴ The constitutionality of any given search depends, therefore, on the application of standards via both

Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (1989).

65. See LAW AND SCHOOL REFORM, *supra* note 44, at 1-36. One such method, vouchers, was recently before the Supreme Court. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

66. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973); *G.I. Forum v. Tex. Educ. Agency*, 87 F. Supp. 2d 667, 671 (W.D. Tex. 2000).

67. See, e.g., *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985) (examining academic discipline); *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 92 (1978) (highlighting deference regarding academic discipline); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1963) (regarding curriculum). See generally Anne P. Dupre, *Disability, Deference, and the Integrity of the Academic Enterprise*, 32 GA. L. REV. 393, 398 (1998) (contrasting higher education to lower education); Blakely Latham Fernandez, *TAAS and GI Forum v. Texas Education Agency: Critical analysis and Proposal for Redressing Problems With Standardized Testing in Texas*, 33 ST. MARY'S L.J. 143 (2001).

68. 469 U.S. 325 (1985).

69. *Id.*

70. 515 U.S. 646 (1995).

71. *Id.*

72. 536 U.S. 822 (2002).

73. *Id.*

74. The school context is not to be underestimated. See, e.g., ROLAND S. BARTH, *LEARNING BY HEART* (2001).

lawyers and educators, and it behooves each to work, co-dependently, with knowledge of the context of each discipline.⁷⁵

Unlike the aphorism, “what you don’t know doesn’t hurt you,” in the quest for meaningful answers to difficult law-education questions, what you don’t know does in fact hurt. Lack of cross-disciplinary knowledge hurts educators, lawyers, and the educational infrastructure and system.

This damage is obvious from principal and educator surveys and from reports of frustration, resistance, and hostility. Evidence of the difficulty is obvious from a recent principals’ survey that reports that educators spend too much time litigating or worrying about litigating.⁷⁶ Apparently this worry is well founded.⁷⁷ Surveys show that too often, educators decide not what is good for their students, but what they believe will best limit their potential legal liability.⁷⁸ When public moneys are paying for litigation, the expedient settlement is attractive, even if it is at the expense of pedagogical wisdom or student welfare.⁷⁹ Too often, such decisions may be made with less than the necessary information. It may well be that one approach *is* as legally sound as another, and the educator is free to choose the most effective educationally. But unless informed of the legal context, educators may *think* their options are limited.⁸⁰ Acting without a

75. An education professor who has studied professional preparation and development and reviewed this manuscript doubted that many administrators would seek out legal advice proactively on search questions. This may well be the case, and calls for more legal education for educators, at least in broad terms. E-mail from Dr. Mark Littleton, Professor of Educational Administration, Tarleton State University, to Sarah E. Redfield, Faculty, Franklin Pierce Law Center (Oct. 16, 2002) (on file with author).

76. Press Release, National Association of Elementary School Principals, School Principal Survey Reveals Fear of Liability Limits Educational Opportunities for America’s Children (available from National Association of Elementary School Principals, 1615 Duke Street, Alexandria, Virginia, 22314; naesp@naesp.org); see also Martin F. Connor, *Lawsuit Abuse and Punitive Damages: The Need for Reform*, 57 SCH. BUS. AFF. 16 (1991); Marilee C. Riss, *High Attorney Fees Lead Some Schools to Compromise*, 177 AM. SCH. BD. J. 17 (Dec. 1990).

77. See *Please Miss, What’s an IEP?*, *supra* note 27. The *Economist* article reports on a Los Angeles teacher winning a \$4.35 million dollar verdict against her school district in a case involving extreme offensive pornography directed at the teacher in a rogue student newspaper. The teacher won on a sexual harassment, hostile environment claim. See Sandy Banks, *A Missed Lesson in Limits of Vile Speech*, L.A. TIMES, Mar. 19, 2002, at Part 5, 1.

78. See Press Release, *supra* note 76.

79. Settlements themselves are, of course, often costly. See *Limiting Your School’s Exposure*, *supra* note 8, at 1; see also *Please Miss, What’s IEP?*, *supra* note 27 (reporting that one in four principals has been involved in a lawsuit and that schools superintendents report that winning does not matter because “[b]efore the cases ever reach court most schools succumb to what they call ‘legal blackmail,’ settling just to avoid lawyers’ fees.”).

80. One example is the area of discipline. The United States Supreme Court directly addressed school discipline in 1975 in *Goss v. Lopez*, 419 U.S. 565 (1975). In *Goss*, the Court found that constitutional Due Process requires appropriate notice and hearing before a student could be suspended from public school for more than ten days. *Id.* at 576. *Goss* is a suspension case, not

thorough understanding of the legal context, school administrators may make a “wrong” educational decision out of fear of litigation, when a “right” one would be just as good in legal terms.

The infiltration of law into schools presents direct difficulties such as the spending too much time worrying about litigation or making inadequately informed decisions. It also presents more subtle difficulties, such as too much confusion and frustration. As administrators and educators find themselves forced to spend their resources to implement court or legislatively imposed legal requirements these feelings are extant. As one education lawyer noted:

I believe that the whole focus of education has been changed by our overly litigious society. Many like to blame lawyers for over litigation, and in part, they may be to blame, but every lawyer must have a client to pursue an action. The more responsibility that we place on schools, the higher the expectation of the consumer. When the impossibly high expectations are not met, which we know that they can never be based upon the societal pressures and financial limitations described above, parents turn to litigation to try to solve the problems with education. This drains districts of resources and the attention to the educational program is diverted to defend the lawsuit. More significantly, however, educators feel as though they are under attack; the veterans with experience and expertise are fleeing to retire and many bright young people are not entering the field of education at all. This just exacerbates the problems that already exist in education.⁸¹

This frustration and hostility evinces at least a lack of understanding between the policy makers and local deliverers and a mutual lack of understanding of the law’s genesis and impact:

an expulsion case. *Id.* As schools tried to put *Goss* into practice, a lack of basic understanding as to the core concepts of *Goss* led to the parameters of the disciplinary actions of schools becoming clouded. As Judge Wilkinson observed: “Once again, school officials, as far as constitutional law is concerned, are not really enlightened as to what it is they are supposed to do. In many instances, they have kept the suspension under ten days not because a student deserved a suspension under ten days, but because the law dealing with suspensions longer than ten days is so unclear. *Panel II: Due Process and Public Education*, 1 MICH. L. & POL’Y REV. 339, 340 (1996); *see also* Sacken, *supra* note 50, at 6.

81. Interview by Dr. Carol Roberts with Rosemary Mullaly, Esq., Legal Department, Chester County (PA) Intermediate Unit (Sept. 2001); *see also* LAW AND SCHOOL REFORM, *supra* note 44, at 5; *Selecting and Working with a School Attorney: A Guide for School Boards*, at <http://www.nsba.org/cosa/About/aboutschlaw.htm#historic> (last visited Oct. 2, 2001). The idea that school leaders must feel in control is not unique. *See* SCHLECHTY, *supra* note 50 (“To change a system leaders must control that system and feel that they are in control. Today many education leaders—policymakers, administrators and teachers—feel powerless If educational leaders are to improve these systems, however, they must learn to control them; for without control there can be no systematic improvement To improve the systems they lead leaders must first understand those systems.”).

The present legalistic web has been spun not by central design, but by uncoordinated drift. Time and time again, in situation after situation, courts, legislators and regulators have promulgated policy without paying attention to how local deliverers of social service could comply. Despite some success, the following frustrating cycle of implementation often has unfolded: Legislation, regulations, or court decision are met at the local level by confusion, resistance, or painfully slow and half-hearted compliance; judges, agencies and regulators eventually respond by tightening rules and toughening enforcement; and local institutions ultimately “comply” by adhering narrowly and legalistically to the letter of the law, which has become by then exceedingly intricate This legal tangle creates numerous problems . . . most importantly, disappointing outcomes for the laws’ intended beneficiaries.⁸²

Recognizing this cycle of expectation, litigation, and even frustration, the inescapable reality is that educators need some grounding and some method for staying current with the relevant law, and lawyers need to understand and be current with today’s educational reality to lessen the negative impacts of potential litigation and legislation. To work together successfully, denial of the other’s discipline is no longer possible and naiveté is no longer acceptable for either discipline.⁸³

Admittedly, educators perhaps do not come to their attorneys in the best frames of mind—generally they have a problem, often a problem they may not have the expertise to handle. Their attorneys may not be overly prepared either.⁸⁴ Educators observe that lawyers are often ill informed about education, administration, and research.⁸⁵ This is not surprising, given that the typical law student focuses on legal research and will not necessarily be exposed to the methodology for research in the social sciences, even though such research may well be the turning point in a case. Indeed, *Brown* itself offers the classic example. The social science research of Dr. Kenneth Clark, through his historic experiment showing black and white dolls to black children who consistently preferred the white dolls, demonstrated that segregation caused low self-esteem.⁸⁶ While such research may have been crucial to the initial desegregation decisions, such understanding seems to be lacking in today’s decisions to terminate

82. See, e.g., Paul Berman, *From Compliance to Learning: Implementing Legally-Induced Reform*, in KIRP & JENSEN, *supra* note 50, at 46; Beckham, *supra* note 51, at xiv.

83. Jan G. Borelli, *Who’s the School Lawyer Working For?*, AASA: The School Administrator Web Edition (Feb. 2000), at http://www.aasa.org/publications/sa/2001_02/reeves_side_lawyer_work_for.htm (last visited Oct. 31, 2001) (quoting one superintendent: “I have to admit to being blatantly naïve about the what’s what and who’s who of school legal operations.”).

84. See *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, 1992 ABA SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR, The MacCrate Report.

85. See, e.g., LAW AND SCHOOL REFORM, *supra* note 44, at 6; Trotter, *supra* note 3, at 12.

86. See Gordon Beggs, *Novel Expert Evidence In Federal Civil Rights Litigation*, 45 AM. U. L. REV. 1, 9 (1995).

desegregation plans where lack of meaningful collaboration between educators and lawyers on the factual situation of schools “has often led to decisions that read very selectively from the law and to plans that create highly segregated and unequal schools.”⁸⁷ Desegregation thus offers one example of a need for education-informed lawyers. But even beyond the issues of identification and use of social science research, legal research is not organizational design. Legal analysis does not offer an equivalent framework for understanding discretion in school decision making or the like.⁸⁸ Still, it is in these arenas, and in the areas of convergence previously discussed, where education-informed lawyers who are able to move inside the schoolhouse, will be so important.

III. ISSUES OF INFRASTRUCTURE

To increase the likelihood of wise decision-making and to avoid the difficulties outlined as law and education converge, many legal and education experts have written for years about the importance of teaching educators about the law.⁸⁹ A recent study of Texas educators by Dr. Mark Littleton, Professor of Educational Administration at Tarleton State University (Texas), and his colleagues reviewed the existing research on educator legal knowledge. Dr. Littleton concluded that while more research is needed⁹⁰ the existing research has “identified that school officials displayed an alarming lack of knowledge about

87. Orfield, *supra* note 45, at 41. *See generally* Belk v. Charlotte-Mecklenburg Bd. of Education, 269 F.3d 305 (4th Cir. 2001), *cert. denied*, 122 U.S. 1538 (2002) (being the most recent in a line of twenty years of litigation regarding desegregation and unitary status).

88. *See* KIRP & JENSEN, *supra* note 50, at 6; Sacken, *supra* note 50, at 10.

89. *See, e.g.*, ISAAC ERSOFF, LAW AND THE PROFESSIONAL EDUCATOR (2000); NATHAN L. ESSEX, SCHOOL LAW AND THE PUBLIC SCHOOLS: A PRACTICAL GUIDE FOR EDUCATIONAL LEADERS, at xvii (Allyn & Bacon 1999); VICKI NORD PETZKO, PREVENTING LEGAL HEADACHES 34-37 (Apr. 2001); Brenda Davis & James Williams, *Integrating Legal Issues into Teacher Preparation Programs* (1992) (ERIC Document Reproduction Service No. ED 347 139); ECS Law and Education Center, *Footnotes* (1980) (ERIC Document Reproduction Service No. ED 203 455); D. Gullatt & J. Tollett, *Education Law: A Relevant Course for All Teacher Education Programs* (1995) (ERIC Document Reproduction Service No. ED 389 695); Robert J. Simpson, *Teaching Law and Education Outside Law Schools* (1975) (ERIC Document Reproduction Service No. ED 163 826); *Teaching Teachers About Law in the 90s: Models, Methods, and Means* (1993) (ERIC Document Reproduction Service No. ED364 482); Mark G. Yudoff, *Law and Educators: Research Past and Future* (1979) (ERIC Document Reproduction Service No. ED 220 447); InfoGuide, School Law (1993), available at <http://www.lectlaw.com/files/lwr05.htm> (last visited Oct. 17, 2001).

90. MARK LITTLETON ET AL., ANALYSIS OF LEGAL KNOWLEDGE OF SCHOOL OFFICIALS IN TEXAS, Education Law Association 6 (2001), available at <http://www.tarleton.edu/mlittleton/ELAPaper.pdf> (last visited Dec. 1, 2001); Kathleen A. Sullivan & Perry A. Zirkel, *Education Law Texts Usage: Survey Results*, 27 J.L. & EDUC. 423 (1998) (“Despite increasing interest in education law, research regarding training in education law for teachers and administrators, remains limited.”).

legal issues that affect them on a daily basis.”⁹¹ Significantly, even where school leaders do demonstrate legal knowledge, they have “difficulty applying that knowledge to situations that occur on a daily basis.”⁹² The Texas study is consistent with other surveys showing that educators’ knowledge of core legal principles is limited and that educators themselves recognize the need to learn more about education law.⁹³

Despite the many studies and reviews, the progress toward educating educators about the law seems slow.⁹⁴ Admittedly, it is difficult to gauge the advent or extent of education law required to be or actually offered to educators. Rather than a clear system to assure such education, there is an accumulation of standards that are diverse and largely indirect.⁹⁵ There are national frameworks, which may or may not become part of state law by means of statute or regulation. Even when states adopt a national framework, that framework may or may not be actualized into educator education schema through schools of education and other professional development providers.⁹⁶

Relevant national frameworks and standards for requiring educators to be informed about the law exist at the educator level and at the institutional level. Together they could be read to support the idea that educators, particularly administrators and those involved with special education, need knowledge of the legal context in which they work and should be exposed to it during their own educations. But the message is not straightforward, uniform, or universal. The delivery is even less clear. This part of the paper first discusses frameworks and standards of various types and levels that begin to shed light on the extent of efforts to incorporate the legal context into educating educators. Teacher, special educator, and administrator requirements are reviewed via national frameworks, state law, and schools of education. The translation of standards to schools of education is also reviewed. Against this background, this part at least poses the question of why we find the current patchwork. The next part discusses the value of moving to a more realistic and interdisciplinary approach.

91. LITTLETON ET AL., *supra* note 90, at 3. See also CEPI interview, *supra* note 13.

92. LITTLETON ET AL., *supra* note 90, at 4.

93. See, e.g., LOUIS FISHER & GAIL PAULUS SORENSON, SCHOOL LAW FOR COUNSELORS, PSYCHOLOGISTS, AND SOCIAL WORKERS 215-25 (1996); LITTLETON ET AL., *supra* note 90, at 12, 24; PETZKO, *supra* note 89, at 34; Gary L. Reglin, *Public School Educators’ Knowledge of School Law*, ILL. SCHOOL J. (1990). Interestingly, the author was unable to find similar surveys of legal professionals.

94. From anecdotal information and observation of the author, the reverse seems equally true.

95. Telephone interview with Pamela Ehrenberg, National Council for Accreditation of Teacher Education (Apr. 1, 2002) [hereinafter Ehrenberg interview].

96. This could be because of state law or because of such institutions’ own initiatives. For further discussion of the standards applicable to such institutions, see *infra* note 130 and accompanying text.

A. The National Scheme

1. *Teachers.*—At the teacher level, except for special education teachers, there seem to be few consistent requirements for educators being law-informed.⁹⁷ To reach this conclusion requires review of a patchwork of models, standards, and applications, starting at the national level and working through to schools of education. Beginning at the national level, there are two national groups that offer the leading models for standards for teachers, the Interstate New Teacher Assessment and Support Consortium (INTASC)⁹⁸ and the National Board for Professional Teaching Standards (NBPTS).⁹⁹

Principle #10 of INTASC's Model Standards for Beginning Teacher Licensing and Development provides an umbrella for several subsections. Principle #10 states: "The teacher fosters relationships with school colleagues, parents, and agencies in the larger community to support students' learning and well-being." Principle #10 is more specifically elaborated in its Knowledge section as:

The teacher *understands and implements laws related to students' rights and teacher responsibilities* (e.g. for equal education, appropriate education for handicapped students, confidentiality, privacy, appropriate treatment of students, reporting in situations related to possible child abuse).¹⁰⁰

In comparison, the NBPTS describes its standards as offering a "consensus among accomplished teachers and other education experts about what accomplished teachers should know and be able to do."¹⁰¹ They are endorsed and encouraged but not mandatory.¹⁰² The NBPTS Standards for teachers,¹⁰³

97. For purposes of this paper, standards were specifically reviewed for regular teachers and special education teachers but not for individual disciplines such as math, history, etc. Special educator standards are discussed further. See *infra* note 105 and accompanying text.

98. Interstate New Teacher Assessment and Support Consortium, *Model Standards for Beginning Teacher Licensing and Development: A Resource for State Dialogue* (1991), available at <http://www.ccsso.org/intascst.html#draft> [hereinafter INTASC, *Teacher Licensing*] (last visited Mar. 28, 2002) (emphasis added). These are not standards. They are principles or models. The INTASC describes itself as a starting point for dialogue. *Id.* at 1. See also NBPTS standards discussed *infra* notes 110-13 and accompanying text (describing state law as recognizing them and offering incentives for following).

99. INTASC, *Teacher Licensing*, *supra* note 98.

100. *Id.*

101. NBPTS Standards FAQs, at <http://www.nbpts.org/standards/stds.cfm>.

102. In terms of the applicability of its standards NBPTS notes

A partial list of organizations who have encouraged and supported the work of the National Board includes the American Association of School Administrators (AASA), the Council of Chief State School Officers (CCSSO), the National Conference of State Legislatures (NCSL), the National School Boards Association (NSBA), and the National Association of State Boards of Education (NASBE). In addition, nearly forty

applicable after three years experience, do not appear to include knowledge of the legal context in which teachers must work among their Five Core Propositions or related subsections.¹⁰⁴

2. *Special Education Teachers*.—Similar national frameworks for special education teachers are more precise. For all general and special education teachers working with students with disabilities, Principle #1 of INTASC's Model Standards for Licensing General and Special Education Teachers of Students with Disabilities ("General and Special Education Teachers") provides as an overarching standard: "The teacher understands the central concepts, tools of inquiry, structures of the discipline(s) he or she teaches and can create learning experiences that make these aspects of subject matter meaningful for students."¹⁰⁵ In explaining the "implications for students with disabilities" INTASC indicates:

Both general and special education teachers demonstrate an understanding of the primary concepts and ways of thinking and knowing in the content areas they teach as articulated in INTASC subject matter principles *and other professional, state, and institutional standards. They understand the underlying values and implications of disability legislation and special education policies and procedures as they relate to their roles and responsibilities in supporting the educational needs of students with disabilities.*¹⁰⁶

states and numerous localities have adopted legislation that provides support or incentives for teachers who pursue or achieve National Board Certification.

Id. NBPTS reports that as of March 2003, legislative and policy action creating incentives and recognition for National Board Certification has been enacted in forty-nine states and in approximately 476 local school districts, including the District of Columbia. See <http://www.nbpts.org/about/state.cfm> (last visited Apr. 16, 2003). In regard to its relationship to NCATE, discussed *infra* note 130, NBPTS notes that the "National Council for Accreditation of Teacher Education (NCATE) requires that, as a condition of accreditation, advanced degree programs show the influence of the NBPTS mission." NBPTS Standards FAQs, *supra* note 101.

103. "At the core of the National Board Certification process are standards that describe the highest level of teaching in different disciplines and with students at different developmental levels." *Id.*

104. NATIONAL BD. FOR PROF'L TEACHING STANDARDS, FIVE CORE PROPOSITIONS, <http://www.nbpts.org/about/coreporps.cfm>. These standards are meant to apply to teachers after their third year of teaching. They are apparently meant to be cumulative with the new teacher standards, i.e., NBPTS candidates are presumed to have the competencies of beginning teachers and build on them. Additionally, individual subject matter standards may include reference to equity and to law or ethics, *see, e.g.*, Telephone interview with Mary Lease, NBPTS (Mar. 28, 2002) [hereinafter Lease interview].

105. INTERSTATE NEW TEACHER ASSESSMENT AND SUPPORT CONSORTIUM MODEL STANDARDS FOR LICENSING GENERAL AND SPECIAL EDUCATION TEACHERS OF STUDENTS WITH DISABILITIES: A RESOURCE FOR STATE DIALOGUE 10 (2001) [hereinafter MODEL STANDARDS], *available at* <http://www.ccsso.org/intasc.html>.

106. *Id.* (emphasis added).

This, in comparison to the *Teacher Licensing* standards and the NBPTS standards, clearly acknowledges the role that federal and state law play in education students with disabilities. The last sentence, which requires that “[a]ll teachers provide equitable access to and participation in the general curriculum for students with disabilities”¹⁰⁷ seems particularly in tune with IDEA’s least restrictive environment requirements,¹⁰⁸ as well as with the civil rights laws aimed at eliminating discrimination in education.¹⁰⁹ This intent is expanded in the specific requirements supporting Principle #1, which states, that all teachers working with students with disabilities must know the relevant major legislation, § 504 of the Rehabilitation Act of 1973, IDEA, and the ADA.¹¹⁰ Section 1.04 of the Model Standards for Licensing General and Special Education Teachers of Students with Disabilities outlines the following as core legal concepts of disability law:

They understand key concepts such as special education and related services; disability definitions; free appropriate public education; least restrictive environment and continuum of services; due process and parent participation and rights; and non-discriminatory assessment. They also understand the purpose and requirements of Individualized Education Programs (IEPs), including transition plans, and Individualized Family Support Plans (IFSPs), both of which are specified in IDEA, and Individual Accommodations Plans (IAPs), which are specified in Section 504, and their responsibility for implementing these plans.¹¹¹

This Principle, also incorporates relevant law at the procedural and policy level:

1.05 All teachers know about and can access resources to gain information about state, district, and school policies and procedures regarding special education, including those regarding referral, assessment, eligibility, and services for students with disabilities. Examples of resources include special education teachers, support professionals, social service agencies, Internet sites, professional education organizations, and professional journals, books and other

107. *Id.*

108. *See* 20 U.S.C.A. § 1412(a)(5) (2002) (providing that children with disabilities are educated with children who are not disabled to the maximum extent appropriate).

109. *See, e.g.,* 20 U.S.C.A. § 1681 (2002) and 34 C.F.R. § 106.1 (2002) (prohibiting sex discrimination in education); 42 U.S.C.A. § 2000(d) (2002) and 34 C.F.R. § 100.1 (2002) (prohibiting race discrimination in federally-assisted programs); 29 U.S.C.A. § 794 (West 1999 & Supp. 2002) and 34 C.F.R. § 104-1 (2002) (prohibiting discrimination on the basis of disability or handicap in a federally-sponsored program); 20 U.S.C. § 1400-1487 (2002) and 34 C.F.R. § 300 (2002) (ensuring free public special education to children with disabilities).

110. *See* MODEL STANDARDS, *supra* note 105, at 10.

111. *Id.* § 1.04.

documents.¹¹²

While the above apply to all teachers who teach students with disabilities, there are additional provisions regarding special education teachers as such. The specific requirements supporting Principle #1 for special education teachers focus on responsibilities for developing and implementing

individualized education programs (IEPs), individualized family service plans (IFSPs), and individual accommodation plans (IAPs) for students with disabilities:¹¹³ *They know what the law requires with regard to documents and procedures and take responsibility for ensuring that both the intent and the requirements of the law are fulfilled.*¹¹⁴

The standards recognize that special education teachers will be a major source of such legal knowledge:

Special education teachers serve as a resource to others by *providing information about the laws and policies that support students with disabilities (e.g., IDEA, Section 504, Americans with Disabilities Act)* and how to access additional information when needed.¹¹⁵

In comparison, NBPTS refers to legal matters in less detail in its standards and certificate information for experienced special education teachers.¹¹⁶ Standard II, Knowledge of Special Education includes the following: “Accomplished teachers of students with exceptional needs draw on their knowledge of the philosophical, historical, and *legal foundations* of special education and their knowledge of effective special education to organize and design instruction”¹¹⁷

C. Administrators

At the level of national frameworks for administrators, the Interstate School Leaders Licensure Consortium’s (ISLLC) Standards for School Leaders explicitly address the legal context. Standard Six provides that a “school administrator is an educational leader who promotes the success of all students by understanding, responding to, and influencing the larger political, social,

112. *Id.* § 1.05.

113. *Id.* § 1.11. This standard offers further guidance. “For example, they know who needs to be involved in the development of the plan and how to facilitate their involvement, and what needs to be included in the plan (e.g., a description of the student’s present level of performance, a behavior support or transition plan if needed, long term goals and short term objectives or benchmarks).” *Id.*

114. *Id.* (emphasis added).

115. *Id.* § 1.12 (emphasis added).

116. See NBPTS Standards, available at <http://www.nbpts.org> (last visited Apr. 6, 2002).

117. ISLLC, Guide to National Board Certification, Early Childhood Through Young Adulthood/Exceptional Needs Specialists Standards, available at http://www.nbpts.org/standards/brief/br_ecya_ens.pdf (last visited Apr. 6, 2002) (emphasis added).

economic, *legal* and cultural context.”¹¹⁸ The Knowledge requirements under this Standard include an understanding of government, democratic society, conflict resolution, and “the political, social, cultural and economic systems and processes that impact schools.”¹¹⁹ Here the standards recognize both the knowledge of law and the role of law. They acknowledge the role administrators play not only in policy development but also in assuring that the fairness mandated by constitutional or statutory provisions is assured. The Knowledge requirement of Standard Six demands that administrators have a knowledge and understanding of: “*the law as related to education and schooling*, the dynamics of *policy development and advocacy* under our democratic political system, and the importance of *diversity and equity* in a democratic society.”¹²⁰

The next layer, termed Dispositions, under this same Standard provides for active participation “in the political and *policy-making context* in the service of education” and “*using legal systems to protect student rights and improve student opportunities*.”¹²¹ Performances under this Standard include another reference to legal requirements: “The school community works within the *framework of policies, laws, and regulations* enacted by local, state and federal authorities.”¹²²

The national frameworks are neither inherently consistent in their message nor binding across levels or among groups. Standards such as those put forth by INTASC, NBPTS, and ISLCC are model standards, and their exact translation or adoption is not clear.¹²³ The requirement, to the extent there is one, for educators learning law is derived from state statutes and regulations for licensure, certification, and recertification, and less directly from state standards for approval of colleges and universities teaching educators. The National Association of State Directors of Teacher Education Certification compiled a manual comparing certification requirements among the states.¹²⁴ Law is not specifically tabulated. However, the familiarity with the U.S. Constitution and

118. See INTERSTATE SCH. LEADERS LICENSURE CONSORTIUM, STANDARDS FOR SCHOOL LEADERS (Washington D.C., Council of Chief State School Officers 1996), Standard Six, *available at* <http://www.ccsso.org> (last visited Mar. 27, 2002) (emphasis added). Thirty-four states report that they have adopted ISLLC standards or standards in close correlation with ISLLC standards. ISLLC, ISLLC Projects and Participating States (2002), *available at* <http://www.ccsso.org/pdfs/isllcchart00.pdf> [hereinafter ISLLC Projects] (last visited March 29, 2002).

119. *Id.*

120. *Id.* at 20 (emphasis added).

121. *Id.* (emphasis added).

122. *Id.* at 21 (emphasis added). See also ISLLC, Standards Three and Five.

123. For example, ISLCC’s listing of projects and participating states offers two categories of check off for compliance, one for “states reporting that they have adopted or adapted the ISLLC Standards for their state school leader standards” and another for states reporting a “close correlation to the ISLLC standards or reported consistent with the ISLLC Standards.” See ISLLC Projects, *supra* note 118.

124. NASDTEC MANUAL ON THE PREPARATION AND CERTIFICATION OF EDUCATIONAL PERSONNEL (2001).

the constitution in that particular state is listed as a requirement for seven states: Arizona, California, Connecticut (described as U.S. history), Florida, Montana, Nevada, and Wyoming.¹²⁵ There appears to be no cumulated, comparative data on such state requirements specific to law.¹²⁶ What research does exist specific to state law and requirements for educators learning the legal context seems to show that in most states, no law courses are required at the teacher level.¹²⁷ Administrator level law requirements are more common (as ISLLC would suggest)¹²⁸ as are special educator requirements (as INTASC would suggest). Given this, as discussed in the next section, ultimately the actual reality of educators learning law lies in the curricula, courses, and other professional development opportunities offered.¹²⁹

D. Schools of Education

Translation of national frameworks for teachers and administrators, with or without state statutory or regulatory requirements, to educator curricula is obviously dependent on those institutions teaching educators. Here, the reference to law also remains obscure. Just as translating the national frameworks and recommendations for law education for teachers and administrators into state law is hard to track, so too it is difficult to see how those

125. *See id.*, Table B-3.

126. Telephone interview with M. Jean Miller, Director, INTASC, Council of Chief State School Officers (Mar. 28, 2002). There is information on standards available through the mandatory reporting requirements of Title II of the Higher Education Act of 1998, though access appears to be limited to state-by-state inquiry. *See* Title II Reporting, Technical Assistance Services, *available at* <http://www.title2.org> (last visited Mar. 28, 2002); *see also* State Title II Reports on the Quality of Teacher Education, *available at* <http://www.title2.org/statereports/BkgInfo.pdf> (last visited Apr. 4, 2002) (noting difference and non-comparability of state licensure and certification requirements).

127. *See, e.g.*, LITTLETON ET AL. *supra* note 90, at 6. An informal e-mail survey conducted by Heather Logan at Franklin Pierce Law Center in December and January confirms this [hereinafter Logan e-mail survey]. Of the fourteen states which responded regarding required legal education for teachers, one (New Mexico) indicated that a course in detecting and reporting child abuse was required, one (Utah) indicated that law training was required, nine indicated that it was not, and three suggested this was a decision made at the college level.

128. ISLLC reports that thirty-four states have “adopted or adapted the ISLLC Standards for their state school leader standards.” ISLLC Projects, *supra* note 118. This is an area where further comparative and cumulative research would be useful. In Logan’s informal survey, of the fourteen states that responded, five indicated that there are state requirements for law knowledge for administrators. *See* Logan e-mail survey, *supra* note 127.

129. For example, NBPTS indicates that master teachers are life-long learners and will acquire the knowledge they need from magazines and other publications as well as professional conferences and the like. Lease interview, *supra* note 104. *But see* BARTH, *supra* note 74, at 22 (observing marked decrease in interest in professional development from beginning to more experienced teachers).

state requirements that do exist are translated into practice.

As with the individual-oriented standards, there are also national groups involved with institution-oriented standards. The National Council for Accreditation of Teacher Education (NCATE) is recognized by the Department of Education as the “national professional accrediting agency for schools, colleges, and departments of education that prepare teachers, administrators, and other professional school personnel.”¹³⁰ As with the application of model standards for individuals, NCATE accreditation standards are not mandatory.¹³¹ Over forty states are partners with NCATE, but not every institution in these states is NCATE accredited.¹³²

NCATE’s Professional Standards for the Accreditation of Schools, Colleges, and Departments of Education¹³³ directly address legal matters only in the supporting explanation for “professional knowledge and skills for other school personnel,”¹³⁴ which provides, in part, that “They understand and are able to apply knowledge related to the social, historical, and philosophical foundations of education, professional ethics, *law*, and policy.”¹³⁵

More generally, the NCATE standards speak to both candidate performance and unit or institutional capacity,¹³⁶ and in each case incorporate by reference indication that both meet “professional, state, and institutional standards.”¹³⁷ To the extent that such state or professional standards require knowledge of the legal context,¹³⁸ these proficiencies would seemingly be translated through such NCATE standards to institutions educating educational personnel.

Likewise, to the extent such proficiencies are part of other professional standards they would be incorporated as well. NCATE expressly aligns its standards with the INTASC new teacher standards.¹³⁹ It also uses standards of other professional groups. For example, NCATE lists among its program standards specialty associations, the Council for Exceptional Children (CEC).¹⁴⁰

130. NATIONAL COUNCIL FOR THE ACCREDITATION OF TEACHER EDUCATION, PROFESSIONAL STANDARDS 6 (2002) [hereinafter NCATE, PROFESSIONAL STANDARDS], *available at* http://www.ncate.org/2000/unit_stnds_2002.pdf (last visited Mar. 28, 2002). There is also The American Association of Colleges for Teacher Education (AACTE), which is “a national voluntary organization of colleges and universities that prepare the nation’s teachers and other educational personnel.” Introducing AACTE, *available at* http://aacte.org/Membership_Governance/intro-aacte.htm (last visited Apr. 4, 2002).

131. NCATE, PROFESSIONAL STANDARDS, *supra* note 130, at 1.

132. About 550 institutions are currently NCATE accredited, accounting for some two-thirds of teachers. Ehrenberg interview, *supra* note 95.

133. NCATE PROFESSIONAL STANDARDS, *supra* note 130.

134. *Id.* at 16.

135. *Id.* at 19 (emphasis added).

136. *Id.* at 9.

137. *See, e.g.*, Standard 1 and Standard 6. *Id.* at 10-11.

138. *See supra* note 114 and accompanying text.

139. NCATE PROFESSIONAL STANDARDS, *supra* note 130, at 17-18.

140. *Id.* at 42.

In this case, the CEC states, “the professional conduct of entry-level special educators is governed foremost by the CEC Code of Ethics,” which provides:

Special education professionals

- Seek to uphold and improve, where necessary, *the laws, regulations, and policies* governing the delivery of special education and related services and the practice of their profession.
- Do not condone or participate in unethical or *illegal acts*, nor violate professional standards adopted by the Delegate Assembly of CEC.¹⁴¹

A second national group, the Association of Teacher Educators (ATE), offers Standards for Teacher Educators, that is, those who educate educators. The ATE standards do not seem to recognize the significance of legal knowledge in the educational setting, although they do recognize the law’s significance in the community. Standard Six provides that master teacher educators should “[s]erve as informed, constructively critical advocates for high-quality education for all students, public understanding of educational issues, and excellence and diversity in the teaching and teacher education professions.”¹⁴² The Potential Sources of Evidence listed under Standard Six include the following policy-oriented activities:

Promote education through community forums, activities with other professionals and *work with policymakers*.

Informs [sic] and educate those involved in making *governmental policies and regulations* at local, state, and/or national levels to improve teaching and teacher education.¹⁴³

The translation of these frameworks and aspirations into actual course offerings seems sporadic in terms of a serious effort to inform educators of the legal context they need to know. Like the national teacher and administrator models, these standards are largely aspirational, and it is difficult to compare the offerings at this level. Even a cursory survey suggests that such requirements are far from universal and certainly not uniform.¹⁴⁴ At one end of the spectrum of law courses offered by schools of education is perhaps Columbia University Teachers College. Ranked second in the *U.S. News and World Reports*

141. CEC INTERNATIONAL STANDARDS FOR ENTRY INTO PROFESSIONAL PRACTICE, Common Core of Knowledge and Skills for all Beginning Special Education Teachers (Council for Exceptional Children), at <http://www.cec.sped.org/ps/ps-entry.html> (last modified May 10, 2002) (emphasis added).

142. ATE, STANDARDS FOR TEACHER EDUCATORS (The Ass’n of Teacher Educators), available at http://www.ate1.org/teampublish/120_620_2298.cfm (last visited Mar. 28, 2002).

143. *Id.* (emphasis added). As evidence of this, the Standard cites “contributions to educational policy or regulations at local, state, and national levels (e.g., presentations, member of accreditation review teams, commissions or task forces, testimony at state hearings).” *Id.*

144. This is another area where more research would be useful.

rankings,¹⁴⁵ Columbia offers Education and Public Policy; Policy Seminar; Law & Educational Institutions: Equality Issues; Community Politics, Community Policies, and Administrators; Law and the Educational Institutions: Free Speech, Religion, Safety, and Issues of Authority; Role of the State in Education Governance, Policy, and Practice; Education Policy Decision Making; Law and Educational Institutions: College Operation, Private School Operation; Federal Politics, Federal Policies and Administrators; Topics in Policy Analysis for Administrators; Topics in Policy Planning and Implementation; Purposes and Policies for Higher Education; and Basic Practicum in Conflict, Resolutions and Mediation Skills.¹⁴⁶ Harvard School of Education, ranked number one, offers Research Seminar: Civil Rights Enforcement, Law and Social Change; Evaluation of Programs and Policies; Schools and the Law; Higher Education and the Law; Legal Issues Affecting Urban Schools in the Post-*Brown* Era.¹⁴⁷

By comparison, Michigan State University, ranked number one in Elementary Education and number nineteen in Special Education, does not list a law course in its special education program as described on its website.¹⁴⁸ Similarly, the University of California, Berkeley, ranked number four, indicates that it offers no education law courses, although its website lists Legal Issues in Educational Practice and Concepts in Educational Law.¹⁴⁹ Likewise, information from the University of Maryland, ranked number one in Counseling and Personnel Services, number fifteen in Elementary Education, and number ten in Special Education, was also somewhat unclear; its website indicates that it does not require any law courses for undergraduate or Special Education students,¹⁵⁰ but they indicate that they do offer Leadership in Law. The University of Kansas, ranked number one for special education, offers the course Law of Special Education, but it is not required for undergraduates with a Special Education minor¹⁵¹ or for master's level students in early Childhood Special Education.¹⁵²

145. U.S. NEWS & WORLD REP. (2002), available at <http://www.usnews.com/usnews/edu/beyond/bced.htm>.

146. The school describes these courses as its law offerings. Telephone Interview by Brooke Meyer, Columbia University Teachers College (Apr. 4, 2002).

147. Telephone interview by Brooke Meyer, Harvard School of Education (Apr. 4, 2002).

148. See Special Education Course Description (Michigan State University), at <http://ed-web3.educ.msu.edu/cepse/ungrad/course.htm> (last visited Jan. 4, 2002).

149. Telephone interview by Brooke Meyer, University of California, Berkeley (Apr. 4, 2002).

150. See, e.g., University of Maryland College of Education, *A Very Special Undergraduate Education Program at the University of Maryland at College Park Undergraduate Program Description*, at <http://www.education.umd.edu/Depts/EDSP>. The school has offered a summer course on IDEA, but is not aware of the Leadership Law offering. Telephone interview by Linda Dragon with Judy Foster, University of Maryland (Jan. 7, 2002).

151. See University of Kansas, Department of Special Education, *Early Childhood—Special Education*, at http://www.soe.ku.edu/sped/doas/pdf/EarlyChildhood10_01.pdf (last visited Jan. 4, 2002). The website is unclear as to how often the Special Education law course is offered.

152. See University of Kansas School of Education, Department of Special Education,

The developing mid-career programs are similar. The University of Pennsylvania's innovative mid-career program, for example, does not appear to include any law courses among its forty-six modules, though a course entitled Responding to and Shaping Public Policy may be one.¹⁵³ In addition to course limitations, those who teach in this arena do not seem to have the same networking and professional development opportunities as do teachers in other disciplines.¹⁵⁴

The prior examples support the view that there is no coherence in the approach to legal training in education schools. Why is there a dearth of law training for educators and education policy-makers and vice-versa? As the variation and ambiguity of standards suggest, there is little coherence within the education community on the subject. Educators and those who form their curricula either fail to directly acknowledge the relationship and importance of the law to their profession, or they do not know how to incorporate its lessons. Or perhaps the problem runs the other way. Law schools are not much further along in providing education law curricula, particularly in multidisciplinary aspects.¹⁵⁵ Or perhaps the problem arises at a deeper level and is more serious. One commentator observed: "At times education litigation appears to outpace educators' ability to cope—and the result is confusion, frustration and even hostility towards the law."¹⁵⁶ If the underlying problem is this kind of denial or the naiveté previously discussed, the time has come to overcome these barriers and define a way for lawyers and educators to work dependently, not independently.

Undergraduate Minors, at <http://www.soe.ku.edu/sped/undergraduate/index.html>.

153. University of Pennsylvania Graduate School of Education, The Mid-Career Doctorate Program in Educational Leadership, *Curriculum Modules*, at http://www.gse.upenn.edu/midcareer/program_modules.html.

154. For example, it is common for groups of law professors to use subject matter listservs, e.g., a listserv for administrative law professors. However, there is no such forum for education law professors. There are professional development opportunities for this working group, most notably via the Education Law Association, which includes educators, lawyers, and education professors, but they are limited.

155. See generally The Association of American Law Schools (AALS), Education Law, at <http://aals.org/sections/index.html>. AALS lists about 140 professors teaching in this field. AM. ASS'N OF L. SCH., DIRECTORY OF L. TEACHERS 1232-33 (West 2001). This appears to be another area where information is difficult to ascertain and where further comparative and cumulative research would be useful. Not surprisingly, often these lawyers begin without specific subject matter expertise and without the background to understand the reality of school issues. Heubert, *supra* note 52, at 6; McKinney & Drake, *supra* note 51, at 481; see also Jeffrey Horner, *Ten Ethical Commandments for School Lawyers*, 137 EDUC. L. REP. 5, 6 (1999).

156. Merle Steven McClung, *Preventive Law and Public Education: A Proposal*, 10 J.L. & EDUC. 37, 37 (1981).

IV. A NEW CLASS

What you don't know can hurt you. The converse aphorism is also true. What you do know can help you. How can difficulties engendered by too much law and not enough knowledge of the legal context be ameliorated? What will be the benefits? To return to the opening stories, at a very basic level, law education assures that the requisite internal reports and calls are made to report abuse.¹⁵⁷ It assures that social security numbers are not posted as student IDs. It assures that a teacher knows enough to question whether a Star of David raises a gang issue or a religious issue. At a more intricate level, it assures that educators recognize stories such as the T-shirt story as complicated.

More generally, being law-informed allows schools to avoid costly conflict and litigation, either by keeping themselves out of court, or by prevailing (quickly) when litigation arises. As two Arizona superintendents reflected concerning how administrators respond to a threat to call a lawyer:

Such threats often trigger superintendents or their administrative teams into a panic-driven "circle the wagons" frenzy. Their knee-jerk reaction is to immediately call the school district's legal counsel and consume billable minutes exploring the issue. While some matters require this dialogue, we suggest that superintendents who are knowledgeable about the law, understand its application to the basic principles of school operation and insist upon ongoing training of site administrators are less likely to be mired in threatened lawsuits. These superintendents are also more inclined to address the day-to-day issues with minimal consultation with attorneys.¹⁵⁸

157. *E.g.*, Kentucky provides: "Any person who knows or has reasonable cause to believe that a child is dependent, neglected or abused shall immediately cause an oral or written report to be made to a local law enforcement agency or the Kentucky State Police . . ." KY. REV. STAT. ANN. § 620.030(1) (2002); New Hampshire states:

Any physician, surgeon, county medical examiner, psychiatrist, resident, intern, dentist, osteopath, optometrist, chiropractor, psychologist, therapist, registered nurse, hospital personnel (engaged in admission, examination, care and treatment of persons), Christian Science practitioner, teacher, school official, school nurse, school counselor, social worker, day care worker, any other child or foster care worker, law enforcement official, priest, minister, or rabbi or any other person having reason to suspect that a child has been abused or neglected shall report the same in accordance with this chapter.

N.H. REV. STAT. ANN. § 169-C.29 (1990). *See also* Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5101-5107 (2000); *see generally* FISHER & SORENSON, *supra* note 93, at 215-25; U.S. Dep't of Health & Human Servs., *National Clearinghouse on Child Abuse and Neglect Information, State Laws on Maltreatment*, at <http://www.calib.com/nccanch/statutes/index.cfm> (last visited Dec. 1, 2001).

158. Corkill & Hendricks, *supra* note 51. *See generally* Herbert M. Kritzer, *The Professions Are Dead, Long Live the Professions: Legal Practice in a Postprofessional World*, 33 L. & SOC'Y REV. 713 (1999), available at <http://www.polisci.wisc.edu/users/kritzer/research/legalprof/postprof.htm>.

Current standards for liability for sexual harassment offer just one of many possible examples where the knowledge described by these Arizona administrators would work. A superintendent or principal who knows the law about sex discrimination will know the standard for imposing liability on the school district for harassment, including peer-to-peer sexual harassment. For the latter, the law requires that the complaining student show that the school acted with deliberate indifference.¹⁵⁹ An administrator who knows the deliberate indifference standard¹⁶⁰ can address potential problems by putting in place an adequate reporting and investigating system to eliminate situations where such problems will be ignored. Since the liability will lie only where there is "deliberate indifference," a reasonable, preventive, pre-existing system for review and response to harassment claims (this does not mean all claims are valid, rather that there is a system to investigate, respond and follow up) can put the administrator in a position to avoid school liability.

Similarly, knowing the law enables educators to limit their liability under the typical doctrines of qualified immunity.¹⁶¹ The Titusville anecdote in the opening stories is telling.¹⁶² The liability standard is well illustrated by *Nabozny*,¹⁶³ the Wisconsin case (of which the *Dahle* story at the opening appears to be a mirror image) that settled in 1997 for just under a million dollars.¹⁶⁴ In *Nabozny*, Jamie Nabozny sued his school district and several school district officials for what can only be described as a long pattern of egregious treatment, which Nabozny alleged was based on his sexual orientation and gender. The school's response was "boys will be boys."¹⁶⁵ The Seventh Circuit Court of Appeals, reviewing the case before it was settled, explained the standard for liability as whether the school district officials knew or should have known at the time that their actions violated the student's legal and constitutional rights.¹⁶⁶ If so, they faced liability; otherwise, they were entitled to qualified immunity.¹⁶⁷ But how many educators would have known the established state of the law on discrimination and harassment, particularly on equal protection and sexual

159. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 648 (1999). *Davis* also requires that the harassment be severe and pervasive, be known to a person in a position to address the problem, and interfere with the student's ability to receive an education. *Id.*

160. *Id.* at 648, 653-54.

161. See, e.g., *Thomas v. Roberts*, 2003 U.S. App. LEXIS 4153 (11th Cir. 2003) (holding that teachers have qualified immunity for strip searches). The test is whether the law gave "fair warning" that action under given circumstances was unconstitutional.

162. See *supra* notes 6,7 and accompanying text.

163. *Nabozny v. Podlesney*, 92 F.3d 446 (7th Cir. 1996).

164. *Sexual Harassment in Public Schools*, *supra* note 7, at 137.

165. *Nabozny*, 92 F.3d at 451.

166. *Id.*

167. *Id.* at 455. "Thus, the critical questions in this case are whether the law 'clearly establishes' the basis for Nabozny's claim, and whether the law was so established in 1988 when Nabozny entered middle school." Immunity was not found. *Id.*

preference and orientation, as it stood in the 1990s? Where would they have learned the law? Had they actually known (as opposed to should have known) at the time, would the administrators in *Nabozny* have implemented a sex-neutral system for processing complaints of harassment? That the *Dahle* case should be so reminiscent of *Nabozny* gives further grounds for consideration. After *Nabozny*, admittedly in a different state and circuit, how many educators should have known?¹⁶⁸

In our litigious society, it is impossible to completely avoid being sued. However, it is possible to act carefully to limit the risk of litigation, and to increase the probability of quick resolution. In the *Nabozny* and *Dahle* situations, for example, law-informed administrators and educators might have had in place an adequate harassment policy and the whole situation might well have been resolved efficiently and without harm to the student. Similarly, administrators who know the law regarding due process for suspending or expelling a student, or who know the law regarding school searches, can, by following the correct procedures, vastly limit their potential liability.

Knowledge such as this, preventively applied, can save schools and districts in both dollars and time, both of which can be better devoted to education. Indeed, armed with knowledge of the relevant legal parameters, administrators may well choose alternative dispute resolution mechanisms. As the Arizona administrators found:

What benefits will accrue to those who become familiar with legal issues? The most obvious is economic savings in your operations budget. A suburban district in Tucson, Ariz., recently slashed its legal expenses by 50 percent (\$100,000) by proactively promoting statutory and policy awareness and compliance at every school site, by seeking more internal resolution and intervention, by conducting more in-house research of legal concerns and by consciously decreasing the number of "less necessary" calls to the attorney.

In the past two years, not only has the district's initiative and diligence translated into significant cost savings, but the number of cases in litigation also has been reduced. Moreover, several districts we surveyed indicated a greater sense of autonomy by using legal counsel as one resource but not the key player in making decisions.¹⁶⁹

This last point from the Arizona administrators seems particularly salient in the current era of "reform." Not only can knowing the law help educators act preventively and reasonably, it can also help them play a clearly necessary role in litigation strategy and legal development. It is crucial that educators at all

168. The relatively quick settlement in *Dahle* may suggest that all educators should know.

169. Corkill & Hendricks, *supra* note 51; see also McKinney & Drake, *supra* note 51, at 476 ("The evidence indicates overwhelmingly that lawyers substantially impact local educational policy-making. Attorneys not only legitimize school policies, they initiate, clarify, write and oversee policy implementation.").

levels understand the process by which laws and regulations are enacted. This will enable them to act decisively in their own spheres of expertise.¹⁷⁰ It will assure that their voices will be heard and will be influential as school issues are considered and defined. It is thus very important that educators know some law basics, particularly about the various sources of law, including administrative law.

One clear example of the importance of law informed educators and education informed lawyers is IDEA, truly a legalization of an educational mission. The genesis of what is now a vast statutory and regulatory scheme was a consent order, likely drafted by attorneys.¹⁷¹ One can only speculate now as to what the scheme may have been had educators written that first draft. As it stands, IDEA is extraordinarily detailed in its legal requirements, but it will require more than just legal requirements for the intended outcomes of IDEA to be achieved:

This will happen only if educators and lawyers learn to work together more effectively. The legalistic model does, in fact, have serious limitations. Due process by its nature leads schools and parents to view each other as adversaries. Schools, parents, and lawyers must learn to collaborate, not just litigate. Moreover, the dynamic interaction of school systems with the legal processes established by special-education law often results in an exaggerated focus on process instead of on the needs of individual children.¹⁷²

A second major example here, indeed one that will define education for this decade and decades to come, is the matter of education reform. Such reform has been almost entirely law based, but too little attention has been paid to the way in which the sources and structure of law and the attitude and training of lawyers impose their own limitations on reform and its likely success.¹⁷³ Some surveys and research have discussed the extent to which "educational policy-making has been 'lawyerized'" and observed this to be a dangerous trend toward educators' loss of professional autonomy and sound educational policy-making.¹⁷⁴ As the Education Commission for the States has observed, we do not want only lawyers

170. Corkill & Hendricks, *supra* note 51.

171. See generally Thomas Hehir & Susan Gamm, *Special Education*, in LAW AND SCHOOL REFORM, *supra* note 44, at 213.

172. *Id.* at 207.

173. See generally TODD DEMITCHELL & RICHARD FOSSEY, THE LIMITS OF LAW-BASED SCHOOL REFORM: VAIN HOPES AND FALSE PROMISES (1997); LAW AND SCHOOL REFORM, *supra* note 44; Todd A. DeMitchell, *The Legal Confines of School Reform*, Am. Ass'n of Sch. Admin., The School Administrator Web Edition (Nov. 1997), at http://www.aasa.org/publications/sa/1997_11/DeMitchell.htm ("Although the law has been the vehicle for launching school reform efforts, little attention has been paid to the way legal mechanisms enable and constrain effective school reform."). See also Stacie Rissman Joyce, *The School District Attorney: Trends of Legal Involvement in Education*, 10 NOLPE SCH. L.J. 193 (1983).

174. McKinney & Drake, *supra* note 51, at 476.

as our “gatekeepers” for legislative and legal school policy.¹⁷⁵ Nowhere is this more true than in the agenda for school reform where a significant role has been played by equity and adequacy litigation¹⁷⁶ for reform.

Ironically, the crucial lesson to be learned from past litigation is that if lawyers hope to alter the legal distribution of education fundamentally, they cannot rely, as they have in the past, primarily on traditional legal concepts and remedies. Instead, they must turn to advances in educational policy made outside the courtroom and shift their litigation to reflect the knowledge acquired by educators over the past few decades. While standards of equity revolve around concepts familiar to lawyers and legal discourse, a case built around a constitutional right to an “adequate” education demands an educator’s input.¹⁷⁷

Both reform and special education thus offer critical examples of the need for a new class of lawyers, those trained and open to education and children-centered issues, those whose skill set includes negotiation, mediation, and long-term planning. They also offer examples of a new class of educator trained to understand and work successfully in the law and policy arenas.

CONCLUSION: TELL ME A NEW STORY

Although law has become almost omnipresent in school issues, the relationship between lawyers, law, child advocates, and educators does not seem to have improved commensurately. It is so much easier to think that all educators need to know is how to teach and that all lawyers need to know the law.

Given advantages like those discussed in the previous part of this paper, how much education should a lawyer know? At least enough to understand the impact of the key pieces of statutory and constitutional law. How much law should an educator know? Enough to assure that our educational institutions reflect

175. ECS Law and Education Center, *supra* note 89. See McKinney & Drake, *supra* note 51, at 480; Trotter *supra* note 3, at 13; HERBERT M. KRITZER, LEGAL ADVOCACY: LAWYERS AND NON-LAWYERS AT WORK 10-11, 193 (1998). See also RAPP, *supra* note 29, at § 1.02(3)(a)(I). But see Suzanne R. Painter, *Superintendents and School District Attorneys: Who’s In Charge Here?*, 129 EDUC. L. REP. (1998) (suggesting that the policy role of attorneys may be overstated); see also Suzanne Painter, *School District Employment Practices Regarding School Attorneys*, 27 J.L. & EDUC. 73 (1998).

176. See, e.g., Dayton, *supra* note 48. Here again, the convergence is clear:

But without a thorough understanding of legal developments in this area, it is difficult to make competent decisions about potential or pending school funding litigation. Since those disadvantaged by public school funding systems will likely continue to consider the use of litigation for relief, it is important that the scholars and practitioners that potential litigants turn to for counsel have a comprehensive understanding of the law in the area of school funding litigation.

Id. at 449.

177. McUsic, *supra* note 48, at 909.

society's core decisions on constitutional rights.¹⁷⁸ Enough to anticipate legal problems and avoid them by preventive action, or, if not avoid them, at least know when to consult legal counsel early in the dispute. Enough to consider legal implications of policy setting and to participate appropriately in the legislative and administrative process, that is enough to be themselves the gatekeepers of the educational policy field. At least educators should demand and take that one education law course, preferably one that is a relatively in depth survey of basic principles and introduction to legal reasoning.

Again, the opening stories are illustrative. Educators need some basic knowledge, not necessarily in-depth, but with sufficient breadth, to know that symbols like a Star of David may have implications beyond gang activities, to know that students and parents have statutory privacy rights, and to know the general parameters of free speech and due process. Beyond this, they would be well served by taking another course that deals with civil rights issues, and perhaps a third that deals with the legislative and administrative system. Equally crucial, in light of liability and immunity standards, is educators' need to have access to continuing education conferences and seminars on legal developments.¹⁷⁹

Dr. Ellenmorris Tiegerman, founder and Director of the School for Language and Communication Development, observes,

the interface of education and law creates a nexus, which is both conceptual and pragmatic in nature. You are creating a new professional area that arises out of the plethora of cases in the field of education. The "legal educator" can provide a holistic view of the complex issues, which have historically been handled by either educators or lawyers. It has been my experience that lawyers and educators are trained theoretically to function in different service contexts and, as a result, their viewpoints are limited by their separate training. Although they both contribute to part of the process, the translation of information often results in misunderstanding, miscommunication and limited thinking. The problem that presently exists is that educators and lawyers need to train in each other's field, to establish a common lexicon, theoretical framework and operational system to respond to issues that arise in schools.¹⁸⁰

One way to achieve the cross-disciplinary expertise that Dr. Tiegerman suggests is through more interdisciplinary work, more encouragement by education administration advisors of their students' interest in law, more law professors opening their classes to educators and vice versa. Through these and related

178. See *supra* note 43.

179. See, e.g., Frank Aguila & Jackie Hayne, *Tips for the First Year Principal*, 70 CLEARING HOUSE 77, Nov. 21, 1996, available at 1996 WL 11548237 ("Keep current with changes and new programs. You simply must keep current regarding educational issues (school law, in particular)."). See also *supra* notes 32-33.

180. SARAH E. REDFIELD, *THINKING LIKE A LAWYER*, at ix (2002).

efforts, the response to the call for this new class of lawyers and educators will improve the understanding and workings of our education system for the benefit of those who work within and around it, and for the benefit of those children and students whom it serves.

ARTICLES

FREEDOM, RESPONSIBILITY, AND RISK: FUNDAMENTAL PRINCIPLES SUPPORTING TORT REFORM

DEBORAH J. LA FETRA*

INTRODUCTION

The free enterprise system is the engine that drives America's healthy economy, the benefits of which necessarily include inherent risks. Unfortunately, many facets of America's civil justice system operate to shift all of those risks to the entrepreneurs who produce the consumer goods and services that make people's lives easier or more pleasant. Moreover, just as taxes imposed on businesses are necessarily passed on to consumers, consumers must also realize that businesses have passed the costs of outlandish tort verdicts onto them in the form of higher prices. Even worse, many vitally important businesses have simply chosen not to operate in the United States out of fear of litigation.

The tort system has undergone a transformation from one designed solely to redress wrongs to one focusing more and more on criminal-style retribution and redistribution of wealth. In circular fashion, this expansion in tort liability is both a cause and effect of the mind-set that any injury, damage or untoward turn of events in a person's life is the fault of another, for which a lawsuit could bring hefty monetary returns. The lawyers who bring these actions become not only the legal voice for their immediate clients, but for all their potential clients who might someday, somewhere, be "victimized" by people engaged in business.

To counteract this mindset, many states and the federal government are enacting tort reform laws to reduce the most obvious abuses of the civil justice system. These laws seek to equitably balance the risks and benefits of the free enterprise system in a way that protects consumers and promotes a healthier economy. As described below, limitations on tort actions are premised on three important policies: (1) American society as a whole benefits when the freedom to innovate and make mistakes allows entrepreneurs to bring ever-better products to market; (2) people must accept responsibility for the consequences of their choices, even when those choices are foolish; and (3) individuals must be allowed to assess what risks they are willing to assume, even if they are willing

* Principal Attorney, Pacific Legal Foundation, Sacramento, California. B.A., 1987, Claremont McKenna College; J.D., 1990, Univ. of So. Cal. Law Center. The author wishes to thank Robert K. Best, Anthony T. Caso, and M. David Stirling for their helpful suggestions and for developing the Free Enterprise Project, of which this Article is a part, and also to thank Bruce La Fetra for his unending support.

to accept more risk than the courts or legislature deems prudent.

Part I of this Article describes the importance of innovation and competition to America's economic and social health and then addresses the impact of tort liability on one of the sectors of the economy that most requires an incentive to innovate: vaccines and biomedical technology. Part II of this Article focuses on personal responsibility by tracing some of the factors that have encouraged an abdication of individual choice and responsibility in favor of a victim mentality that looks for others to blame. This part considers the impact of "junk science" and the media in promulgating the worldview that every accident or injury must be compensated. Part III of the Article considers the ability of individuals to engage in their own risk assessment and how this intersects with the legal concept of foreseeability. Finally, Part IV of this Article examines a sample of tort reform measures that have emerged in the past ten years in an attempt to once again acknowledge the country's economic and social health as a factor justifiably considered in the formation of tort policy.

I. FREEDOM: THE CATALYST FOR EXPERIMENTATION AND INNOVATION

A. *The Prospect of Tort Liability Inhibits Innovation*

Scientists and inventors toiled for fifty years trying to perfect the electric lamp. The trick was to find the perfect filament that could withstand the heat and still conduct energy for long periods of time. Starting in 1878, Thomas Edison's crew experimented on 6000 types of materials for the filament, eventually narrowing the choices down to just two: platinum and carbonized cotton thread. Platinum could not handle the current without melting, but the carbon filament lasted thirteen hours on the first test. This success went far beyond academic satisfaction. Edison immediately began developing a commercial electric system, and in less than three years after obtaining the patent for the electric lamp,¹ New York City's first power station went into operation in 1882.²

But imagine if Thomas Edison's innovation had come upon the scene 100 years later. The Edison Electric Light Company's legal department would dog the innovators in research and development every step along the way: "Sorry, Tom, we think this electric light bulb idea has promise, but think of the potential liability! We can't risk some bulb overheating and exploding, disfiguring a child and having his parents sue us for everything we've got. Or what if a lamp burns out during some critical medical procedure and the surgeon can no longer see the patient?"³ And, frankly, Tom, at this stage of our business, it wouldn't take but

1. "Patent law creates ownership rights in the results of certain types of innovation. This attracts capital to those research efforts, arming modern-day Edisons with the resources they need to develop innovative ideas." Douglas Gary Lichtman, *The Economics of Innovation: Protecting Unpatentable Goods*, 81 MINN. L. REV. 693, 693 (1997).

2. See *Invention of the Light Bulb*, <http://ushistory.net/electricity.html> (last visited Oct. 15, 2001).

3. Certainly such accidents are in the realm of possibility. See, e.g., *Bruther v. Gen. Elec.*

one or two adverse judgments to bankrupt us.” Fortunately, no legal department stifled Edison’s inventions, and the benefits to society multiplied in his wake. Innovation creates societal value whenever resulting products are brought to market. Consumers who need the product rush to buy it; producers who manufacture the good at a cost below what people are willing to pay rush to sell it. As more people demand the product, and the number of producers increase to respond to the demand, prices decrease.⁴

Innovation depends on the ability to experiment and make mistakes. A fair legal system must provide for the evolution of technology and manufacturing or risk the loss of inventions that benefit all members of society. Unfortunately, the American civil justice system weighs heavily on innovators. As Harvard Business School Professor Michael Porter described it: “In the United States . . . product liability is so extreme and uncertain as to retard innovation. The legal and regulatory climate places firms in constant jeopardy of costly, and, as importantly, lengthy product liability suits.”⁵ It is as though an anvil labeled “potential tort liability” swings precariously over any inventor, manufacturer, or business that dares to deviate from current knowledge and technology.⁶ Any decision to diverge from a well-worn path risks severing the rope holding the anvil and delivering a crushing blow to the business and its innovation. This is particularly anomalous when part of traditional tort law’s philosophy is to encourage innovation and repair to decrease future harm.⁷

A manufacturer that conducts no research can generally avoid liability because plaintiffs and government research programs are unlikely to conduct scientific research on their own. Voluntary safety research, on

Co., 818 F. Supp. 1238 (S.D. Ind. 1993) (glass bulb separated from metal base, causing the worker who was attempting to change the bulb to experience an electrical shock); *Preston v. United States*, 624 F. Supp. 523 (E.D. Mo. 1986) (building owner’s failure to replace burned out light bulb over stairs was negligent when visitor to building tripped and fell in the darkness).

4. See Lichtman, *supra* note 1, at 705. For example, the cost of a videotape recorder was \$3000 in 1975, but better, “hi-fi” VCRs are now routinely available for \$80. See Stephen A. Booth, *The Expanding Universe of VCRs*, 162 POPULAR MECH. 92, 93 (1985); CONSUMER REPORTS BUYING GUIDE 2002 at 57 (2002). Many VCR manufacturers are themselves responding to DVD technology by producing VCR/DVD “combo” units (priced about \$300). For a general review of the new technology, see <http://www.consumersearch.com/www/electronics/vcrs/> (visited Oct. 9, 2002).

5. MICHAEL E. PORTER, *THE COMPETITIVE ADVANTAGE OF NATIONS* 649 (1990).

6. In a 1987 survey, Egon Zehnder International, a New York-based executive search firm, interviewed 101 senior-level executives at large publicly held companies (72% from the industrial sectors; 28% from the service side) on this very question. The survey found that 62% agreed that “innovation and experimentation had been constrained in the last few years.” And of those who believed that, 91% blamed “fear of liability suits” as the leading impediment to innovation. Kenneth Moore, “*Fear of Liability*” *Blocks Innovation; in American Industry; Results of Survey by Egon Zehnder International*, 15 METALWORKING NEWS 6 (Jan. 18, 1988).

7. *Baker v. Burbank-Glendale-Pasadena Airport Auth.*, 705 P.2d 866, 872 (Cal. 1985).

the other hand, might reveal a long-term risk associated with a product, a revelation that could provide vital evidence for aggressive plaintiffs' attorneys and ultimately increase, rather than reduce, the manufacturer's exposure to lawsuits and potentially catastrophic liability.⁸

Businesses are devoting more and more resources that could be used for innovation into defensive measures to protect against the risk of huge verdicts. The increasing incidence and variability of punitive damages awards prompt businesses to allocate greater resources into risk management and insurance to protect against potential financial ruin.⁹ This allocation draws resources away from new product designs and other innovations.¹⁰ But businesses cannot simply reallocate existing resources by gutting research and development. A certain amount of innovation is required to maintain one's competitive position in the market. Consequently, a business must compensate for an overall increase in costs by raising prices or by reducing payment levels to its creditors (e.g., bondholders and vendors).¹¹ Insurers also spread increased costs among their other policyholders.¹²

1. *The Impact of Tort Liability on Vaccine and Biomedical Device Availability.*—Allowing state tort claims against manufacturers may chill a manufacturer's desire to produce new products because of potential liability costs.¹³ This argument has been forcefully advanced in the context of drug

8. Wendy E. Wagner, *Choosing Ignorance in the Manufacture of Toxic Products*, 82 CORNELL L. REV. 773, 775 (1997) (footnotes omitted). For a similar point, see Margaret A. Berger, *Eliminating General Causation: Notes Towards a New Theory of Justice and Toxic Torts*, 97 COLUM. L. REV. 2117, 2139 (1997).

9. See Peter Kinzler, *Recent Studies of Punitive Damage Awards: The Tale of the Tape*, 15 J. OF INS. REG. 402, 418 n.11 (1997) (citing Milton Bordwin, *Practicing Preventive Law; Legal Issues Affecting Corporate Risk Management*, 41 RISK MANAGEMENT 79 (May 1994) (describing corporate risk management response to legislation, regulation, and litigation).

10. See *Do-It-Yourself Insurance*, THE ECONOMIST, Dec. 3, 1994, at 19. Most companies have a limited ability to insure themselves. For example, if a large, heavily indebted firm that self-insures has to pay for a major loss, its resulting finances may render it unable to obtain future capital. The company may have to delay other investments in research and development to pay for the disaster. Small companies face different, but equally daunting, prospects. If a small company is funded by many small investors for whom this one company is their major investment, the investors may not be willing to accept a company policy of paying for disasters that could have been covered by insurance. Conversely, companies that insure against every possible risk could alienate investors for failing to maximize shareholder value. *Id.*

11. See Jonathan T. Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 IND. L.J. 59, 101 (1997).

12. See Kinzler, *supra* note 9, at 402-20.

13. Laura K. Jortberg, *Who Should Bear the Burden of Experimental Medical Device Testing: The Preemptive Scope of the Medical Device Amendments Under Slater v. Optical Radiation Corp.*, 43 DEPAUL L. REV. 963, 984 (1994).

manufacturer liability.¹⁴ As one scholar writes:

Drug manufacturers on the whole produce valuable, sometimes life-saving products. The specter of liability . . . chills the manufacturer's incentive to develop new products, making it prefer instead the tried and true remedies which appear safer from a liability standpoint. Because it is the nature of medical science to advance and progress, a pharmaceutical industry that lags woefully behind scientific advances prevents the public from partaking in new remedies for illness.¹⁵

Tort liability may even force manufacturers to take existing products off the market.¹⁶ The public then suffers from the current liability system because "when it is not cost-benefit effective to produce approved drugs or develop new drugs, the public pays the price in unnecessary and unrelieved suffering."¹⁷

The stifling effect of the tort system is not speculative; examples abound. For instance, vaccines have saved countless lives and greatly improved the health of millions.¹⁸ The statistics demonstrating vaccines' beneficial effects are striking. For the week ending June 8, 1946, health departments reported 161 cases of poliomyelitis (polio), 229 cases of diphtheria, 1886 cases of pertussis, and 25,041 cases of measles.¹⁹ For the first half of 1996, through the week ending June 22, there were no cases of polio, one case of diphtheria, 1419 cases of pertussis, and 263 cases of measles.²⁰ The difference is largely due to widespread vaccination. The Center for Disease Control licensed vaccines for all these conditions after 1946: diphtheria and tetanus toxoids and pertussis vaccine in 1949, inactivated polio vaccine in 1955, live polio vaccine in 1961, and measles vaccine in 1963.²¹ The importance of vaccines could not be more clear. In 1980, eight pharmaceutical manufacturers produced the DPT vaccine; yet, by 1986, there were only two.²² According to the American Medical

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*; see also PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* 4 (1988) (discussing how America's tort system costs manufacturers more than \$80 billion a year in direct payments and insurance costs and thus has prevented new and possibly safer products from entering the marketplace).

18. John P. Wilson, *The Resolution of Legal Impediments to the Manufacture and Administration of an AIDS Vaccine*, 34 SANTA CLARA L. REV. 495, 505 (1994).

19. United States Center for Disease Control, *Historical Perspectives Notifiable Disease Surveillance and Notifiable Disease Statistics—United States, June 1946 and June 1996*, 45 MORBIDITY & MORTALITY WKLY. REP. (June 28, 1996), available at <http://www.cdc.gov/epo/mmwr/preview/mmwrhtml/00042744.htm> (last visited Oct. 10, 2002).

20. *Id.*

21. *Id.*

22. See Jeffrey J. Wiseman, *Another Factor in the "Decisional Calculus": The Learned Intermediary Doctrine, the Physician-Patient Relationship, and Direct-to-Consumer Marketing*, 52 S.C. L. REV. 993, 1002 (2001).

Association, "[i]nnovative new products are not being developed or are being withheld from the market because of liability concerns or inability to obtain adequate insurance."²³ In particular, "[c]urrent legal interpretation of product liability law, especially the doctrine of strict liability, diminishes the incentives of a manufacturer to research, develop and produce vaccines."²⁴ Within the 1980s, ten of the thirteen companies producing vaccines for five serious childhood diseases left the market.²⁵ Not coincidentally, the number of liability suits filed against vaccine manufacturers from 1978 to 1985 increased significantly.²⁶ These lawsuits, resolved either by court awards or out-of-court settlements, forced the pharmaceutical manufacturers to reallocate "an ever larger percentage of the revenues from vaccine sales to the costs of insurance and of defending against potential liability."²⁷ Thus, the cost of products entering the market reflects the manufacturers' increasing cost of purchasing insurance needed to defend against actual and potential lawsuits.

Despite vaccines' spectacular accomplishments, fewer drug companies than ever currently produce much-needed vaccines. For example, with so many manufacturers fleeing the market, the cost per dose of the DTP vaccine increased from eleven cents in 1982 to \$11.40 in 1986.²⁸ Eight dollars of this price paid for liability insurance.²⁹

The fear of liability is responsible for much of the increased cost of vaccines over the past decade Before the liability crisis, back in 1982, the private-sector cost of immunizations for a two-year-old was \$20.17. Ten years later . . . the cost of a complete regimen of vaccinations had risen to \$188.19³⁰

23. Wilson, *supra* note 18, at 513 (quoting ALAN R. NELSON, AM. MED. ASS'N, IMPACT OF PRODUCT LIABILITY ON THE DEVELOPMENT OF NEW MEDICAL TECHNOLOGIES 1 (1988)).

24. *Id.* (quoting NELSON, *supra* note 23, at 2).

25. *Id.* at 505 (citing W. Kip Viscusi & Michael J. Moore, *Rationalizing the Relationship Between Product Liability and Innovation*, in TORT LAW AND THE PUBLIC INTEREST: COMPETITION, INNOVATION, AND CONSUMER WELFARE 105, 111 (Peter H. Schuck ed., 1991)).

26. H.R. REP. NO. 99-908, at 6 (1986), reprinted in 1986 U.S.C.A.N. 6344, 6347.

27. John K. Iglehart, *Health Policy Report: Compensating Children with Vaccine-Related Injuries*, 316 NEW ENG. J. MED. 1283, 1286 (1987).

28. Gregory C. Jackson, *Pharmaceutical Product Liability May Be Hazardous to Your Health: A No-Fault Alternative to Concurrent Regulation*, 42 AM. U. L. REV. 199, 205 (1992) (citing Gina Kolata, *Litigation Causes Huge Price Increases in Childhood Vaccines*, 232 SCIENCE 1339 (1986)); see also *Brown v. Super. Ct. of San Francisco*, 751 P.2d 470, 479 (Cal. 1988) (citing same statistics).

29. *Brown*, 751 P.2d at 479; see also Robert M. McKenna, Comment, *The Impact of Product Liability Law on the Development of a Vaccine Against the AIDS Virus*, 55 U. CHI. L. REV. 943, 955 (1988) (analyzing possibility of similar price stress on development of vaccine for human immunodeficiency virus (HIV)).

30. *The Vaccine Scapegoat*, WALL ST. J., Feb. 23, 1993, at A20.

This cost also included the added costs for two new vaccines.³¹

Without the ability to purchase insurance, pharmaceutical companies respond in two ways. First, they reallocate resources to self-insure; second, they work to improve the safety of their product designs as well as the language of their warning labels to cover any conceivable mishap.³² While these extra efforts do not present a problem per se, companies cannot recover the costs of excessive efforts through an unending series of price increases.³³ The increasing costs, therefore, may ultimately drive the product off the market.

Manufacturers are rightfully wary of widely varying jury awards, particularly when punitive damages are involved.³⁴ Given the history of vaccine litigation, the pharmaceutical companies cannot be faulted for their fear of future liability. The companies' responses to the vaccine litigation suggest that "low liability costs have a positive, stimulative impact on innovation, but high liability costs tend to depress it."³⁵ However, future cases are unlikely to echo precisely the cases that came before because of the highly complex interaction between liability, product design, and product distribution.³⁶ Understandably, they have become apprehensive about entering new markets and cautious about remaining in old ones.

In the past, product liability actions related to vaccine products did not differ from other types of product liability litigation: plaintiffs proceeded under theories of negligence, breach of express or implied warranty, strict liability in terms of design defect, and failure to warn.³⁷ Federal requirements of rigorous testing and review, however, ensured that a vaccine would rarely be improperly prepared.³⁸ Rather, as with many drugs, the problem is that vaccines will always

31. *Id.*

32. Wilson, *supra* note 18, at 507.

33. *Id.*

34. See generally CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE 239-41 (2002) (detailing conclusions derived from empirical studies of jury and judge behavior when confronted with punitive damage award scenarios, and noting specifically that, despite good intentions, juries seem cognitively unable to translate their outrage to dollar amounts in any consistent fashion, and without regard for the standards relayed to them in jury instructions).

35. Wilson, *supra* note 18, at 508 (citing Viscusi & Moore, *supra* note 25, at 122).

36. See *id.* at 536. The recent history of products liability and toxic tort litigation suggests that a single finding of liability for one substance tends to unleash a firestorm of suits involving the same and related products. See, e.g., Joseph Sanders, *From Science to Evidence: The Testimony on Causation in the Bendectin Cases*, 46 STAN. L. REV. 1, 4 (1993) (cataloging more than 2000 cases involving anti-nausea drug). "Once a single birth control device or type of asbestos fiber is found culpable, every other type of device or fiber quickly becomes guilty by association." Dan L. Burk & Barbara A. Boczar, *Biotechnology and Tort Liability: A Strategic Industry at Risk*, 55 U. PITT. L. REV. 791, 838-39 (1994).

37. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 694 (5th ed. 1984).

38. Federal law establishes a system of premarket approval to ensure that new drugs are safe

create some unwanted side effects.³⁹ The people who may be injured by their use usually cannot be identified in advance.⁴⁰ The pharmaceutical companies (who have deeper pockets than individual physicians) are the targeted defendant when individuals do, in fact, suffer adverse reactions to a vaccine.⁴¹ A tiny minority of those vaccinated may contract the very diseases the vaccines are intended to prevent or suffer other serious, potentially deadly, side effects.⁴² For most

and effective. See 21 U.S.C. § 355 (2000). The FDA, advised by outside medical authorities, regulates the premarket testing of new drugs, the approval process, drug manufacturing, labeling and advertising, and post-approval reporting of adverse events. See *id.* §§ 351-355; 21 C.F.R. §§ 200-369. FDA also imposes analogous requirements on biological products such as vaccines. See 42 U.S.C. § 262 (1994 & Supp. V 1999). The regulatory controls over new drugs are enforced through criminal penalties as well as civil sanctions. See, e.g., 21 U.S.C. § 333(a)(2) (2000) (felony violations punishable by imprisonment for not more than three years or a fine of not more than \$10,000 or both); *id.* § 333(a)(1) (misdemeanor violations); *id.* § 332 (injunction proceedings); *id.* § 334 (seizures). See generally SUBCOMM. ON SCIENCE, RESEARCH & TECH. OF THE HOUSE COMM. ON SCI. & TECH., 96TH CONG. REPORT ON THE FOOD AND DRUG ADMINISTRATION'S PROCESS FOR APPROVING NEW DRUGS (Comm. Print 1980) ("the FDA product approval process has become far more sophisticated than the approval process for most other products and also more cumbersome").

39. See Wilson, *supra* note 18, at 537 (citing Okraner C. Dark, *Is the National Childhood Vaccine Injury Act of 1986 the Solution for the DTP Controversy?*, 19 TOLEDO L. REV. 799, 817 (1988)).

40. See Barbara A. Noah, *Adverse Drug Reactions: Harnessing Experiential Data to Promote Patient Welfare*, 49 CATH. U. L. REV. 449, 459 (2000) (noting that clinical trials are based mostly on white males; thus, adverse reactions that might be more likely to occur in women or minority populations may be underreported); Lisa J. Steel, Note, *National Childhood Vaccine Injury Compensation Program: Is This the Best We Can Do for Our Children?*, 63 GEO. WASH. L. REV. 144, 145 (1994) (noting that it is virtually impossible to determine before a child's first vaccination whether he or she will suffer adverse reactions); see also *Brown v. Super. Ct. of San Francisco*, 751 P.2d 470, 481-83 (Cal. 1988) (holding that all prescription drugs are unavoidably dangerous and subject to a negligence standard).

41. See Scott Neuman & Arthur Borja, *Prozac, an Antidepressant That May End up Depressing its Manufacturer*, 2 J. PHARM. & L. 245, 247 (1994) ("To potential plaintiffs' attorneys, Eli Lilly represents a deep pocket that can pay high judgments [in litigation over adverse effects of Prozac]"); Chester Chuang, Note, *Is There a Doctor in the House? Using Failure-to-Warn Liability to Enhance the Safety of Online Prescribing*, 75 N.Y.U. L. REV. 1452, 1456 n.18 (2000) (individuals harmed by "failure to warn" by an online prescription website will likely choose to sue the manufacturer rather than the website because the manufacturer has deeper pockets).

42. The oral polio vaccine is estimated to cause polio once in 3.2 million doses (approximately five cases per year). Swelling of the brain (encephalitis) occurs after the DTP vaccine approximately 43.2 times each year and after the measles vaccination approximately 10 times each year. Vaccine-related deaths are estimated to be a total of five to six cases each year. Mary Beth Neraas, Comment, *The National Childhood Vaccine Injury Act of 1986: A Solution to the Vaccine Liability Crisis?*, 63 WASH. L. REV. 149 n.3 (1988) (citing *Vaccine Injury Compensation, 1984: Hearings on H.R. 556 Before the Subcomm. on Health and the Env't*, 98th Cong. 140 (1984) (statement of Dr. Alan R. Nelson, Member, Board of Trustees, American Medical

people, however, vaccines provide an enormous benefit.⁴³

Other benefits to life and health have suffered as well. In 1983, Merrill Dow Pharmaceuticals voluntarily removed Bendectin from the American market in response to multi-million dollar claims that it caused birth defects in children carried by women who took the drug during pregnancy to combat nausea and vomiting (i.e., morning sickness).⁴⁴ Despite Bendectin's use in over thirty million pregnancies, experts were sharply divided on whether the drug caused birth defects; the majority opinion, however, was that Bendectin "was not a significant teratogen."⁴⁵ The FDA and most courts held there was no increased risk of birth defects associated with Bendectin.⁴⁶ Despite the legal vindication of Bendectin, the American market continues to lack any drugs approved for the treatment of morning sickness, and American pharmaceutical companies have not chosen to invest in research for a new morning sickness drug.⁴⁷ Even members of the plaintiffs' bar concede that Bendectin was driven from the market by unjustified litigation.⁴⁸

Tort litigants have also targeted other lifesaving and life-enhancing implantable medical devices, such as pacemakers, heart valves, and hip and knee joints, resulting in biomedical suppliers leaving the American marketplace.⁴⁹ In

Ass'n).

43. See Center for Disease Control, *What Would Happen if We Stopped Vaccinations*, at <http://www.cdc.gov/nip/publications/fs/gen/WhatIfStop.htm> (last visited Oct. 10, 2002) (detailing number of people who suffered from polio, measles, mumps, tetanus, Hib meningitis, whooping cough, German measles (rubella), hepatitis B, diphtheria, before vaccinations and the extent to which they have been eradicated today). Congress responded to the insurance crisis by enacting the National Childhood Vaccine Injury Act of 1986 (Act), 42 U.S.C. §§ 300aa-1 to -34 (1988), establishing a no-fault system of compensation for injuries suffered as a result of certain vaccine usage. See *infra* notes 176-88 and accompanying text.

44. See Jackson, *supra* note 28, at 207.

45. See *id.* (citing Joseph Sanders, *The Bendectin Litigation: A Case Study in the Life Cycle of Mass Torts*, 43 HASTINGS L.J. 301, 318-19 (1992) (noting that none of thirty-nine epidemiological studies clearly concluded Bendectin caused birth defects)).

46. See *id.* (citing *Turpin v. Merrell Dow Pharm., Inc.*, 959 F.2d 1349, 1350 (6th Cir. 1992) (finding insufficient evidence to conclude Bendectin caused plaintiff's birth defect), *cert. denied*, 506 U.S. 826 (1992); *Richardson v. Richardson-Merrell, Inc.*, 649 F. Supp. 799, 803 (D.D.C. 1986) (citing and following independent FDA advisory panel finding nothing to implicate Bendectin exposure as cause of increased incidence of birth defects), *aff'd*, 857 F.2d 823 (D.C. Cir. 1988)).

47. A small Canadian company, however, has developed an anti-nausea drug that is available only in that country. See <http://www.duchesnay.com/prodcenter.html> (last visited Sept. 27, 2002) (describing effectiveness and availability of Diclectin®).

48. See Jackson, *supra* note 28 (citing Michael A. Pretl & Heather A. Osborne, *Trends in U.S. Drug Product Liability—The Plaintiff's Perspective*, in *PRODUCT LIABILITY INSURANCE AND THE PHARMACEUTICAL INDUSTRY: AN ANGLO-AMERICAN COMPARISON* 109, 114 (Geraint G. Howells ed., 1990) (noting that evidence suggests that Bendectin causes no more incidence of fetal deformities than in the newborn population as whole)).

49. For example, Biomet, Inc., an Indiana-based medical supplies firm, sells a broad range

1993, DuPont Co. sold \$10.5 billion worth of the industrial fibers Dacron®, Teflon®, and Delrin®. Of those sales, only .0057% were to biomedical-implant manufacturers.⁵⁰ However, DuPont ended up spending eight years and \$40 million successfully defending itself against lawsuits involving a faulty jaw implant that contained a nickel's worth of Teflon®.⁵¹ DuPont was the defendant of choice in these lawsuits despite its negligible participation in the development of the defective product for the obvious reason: it had deep pockets.⁵² In contrast, the lawsuits soon bankrupted the small implant makers.⁵³

Biotechnology represents more than simply the hope of improved health care products; it holds the potential to revolutionize products and manufacturing in a variety of industrial sectors and thus is critical to the health and competitiveness of the national economy. However, recent close brushes with the tort system bode ill for this strategic industry. Full-blown litigation over some real or perceived injury is almost inevitable, and the complex scientific issues raised by such litigation appear certain to bring out the worst in our present dispute resolution process.⁵⁴

As described in Part IV below, the severe impact of tort litigation on these critical industries ultimately led to a statutory response.⁵⁵

2. *The Impact of Tort Liability on Competitiveness.*—As the section above demonstrates, not only do consumers of medical and safety devices suffer these losses, but uncontrolled tort liability hampers American businesses' ability to compete in the global market. As liability standards have been expanded since the 1970s, manufacturers have made greater investments to reduce the extent of

of spinal implant products outside the United States. However, it chose not to enter the \$300 million domestic spinal implant products market because pending litigation over such products involves sums three times the annual market size. Daniel Gross, *Deflating Product Liability*, CFO, Apr. 1995, at 70.

50. See Naomi Freundlich, *Congress Should Protect this Medical Lifeline*, BUS. WK., Apr. 21, 1997, at 120.

51. See James D. Kerouac, Note, *A Critical Analysis of the Biomaterials Access Assurance Act of 1998 as Federal Tort Reform Policy*, 7 B.U. J. SCI. & TECH. L. 327, 332 n.26 (2001). The primary products liability decision related to DuPont is *In re Temporomandibular Joint (TMJ) Implants Prod. Liab. Litig.*, 872 F. Supp. 1019 (D. Minn. 1995), *aff'd*, 97 F.3d 1050 (8th Cir. 1996). All the other cases were similarly decided.

52. See Kerouac, *supra* note 51, at 358-59 (suggesting that plaintiffs bring suits against biomedical suppliers even understanding that they are likely to lose on the merits because of the plaintiffs' belief that they will be able to extract a favorable settlement).

53. See Freundlich, *supra* note 50, at 120.

54. See Burk & Boczar, *supra* note 36, at 863. In response to DuPont's business decision (which was echoed by some other biomedical suppliers), Congress passed legislation protecting suppliers of bulk components and raw materials for implants from lawsuits.

55. See *infra* notes 165-225 and accompanying text.

product-related injuries.⁵⁶ These investments do not occur in a vacuum, however, and must be evaluated in terms of both benefits and costs. From an economic view, manufacturer investments in product design is only one means of achieving safety.⁵⁷ Consumer investments also play a role. Consumers may choose to reduce the probability of a product-related injury in various ways, “including choosing a product suitable for the consumer’s needs and using the product in a way that optimizes safety, both with respect to the method and frequency of use.”⁵⁸ Consumer investments in safety are inversely related to manufacturer investments: the more manufacturer’s invest in safety, the less careful consumers must be,⁵⁹ and vice-versa.⁶⁰ Along these lines, one district court has emphasized that defendants should not have to spread among its customers the economic loss resulting from injuries from a product that is *not* defective, and for which the risk of harm can be eliminated by operating the product properly and heeding given warnings.⁶¹

Safety equipment for various sports has also suffered from the anvil of tort liability. Julie Nimmons, Chief Executive Officer of Schutt Sports Group, testified to Congress in 1993 that material suppliers are reluctant to sell to her company, a manufacturer of protective sporting goods equipment, for fear of liability. As a result, the company was unable to obtain the raw materials needed to produce and market a new baseball safety helmet that functioned well in prototype testing.⁶² This reluctance sometimes kills new product development. For example, the company chose not to produce hockey helmets, even though interest in the sport has grown substantially in the United States. Nimmons testified that “[i]n the final analysis, we felt we could not pursue this market because of the additional, uncontrollable liability exposure it would create.”⁶³

56. See George L. Priest, *Lawyers, Liability, and Law Reform: Effects on American Economic Growth and Trade Competitiveness*, 71 DENV. U.L. REV. 115, 136 (1993) (citing George L. Priest, *Products Liability Law and the Accident Rate*, LIABILITY: PERSPECTIVES AND POLICY 184 (Robert E. Litan & Clifford Winston eds., 1988)) (comparing product design before and after the expansion of liability standards).

57. See *id.*

58. See *id.* (citing George L. Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297, 1310-13 (1981)).

59. See *infra* notes 126-64 and accompanying text (describing the impact of safety devices on consumers’ willingness to accept greater risks).

60. See Priest, *supra* note 56, at 136.

61. *Monahan v. The Toro Co.*, 856 F. Supp. 955, 964 (E.D. Pa. 1994) (determining that a fatal accident involving lawn tractor was not manufacturer’s fault where warning cautioned against mowing on a steep slope and decedent had actual knowledge that the tractor was prone to tip over in such circumstances).

62. *Product Liability Law Revision: Hearing Before the Senate Comm. on Commerce, Sci. and Transp.*, 105th Cong. 2 (1997) (statement of Julie Nimmons), cited in Victor E. Schwartz & Mark A. Behrens, *A Proposal for Federal Product Liability Reform in the New Millennium*, 4 TEX. REV. L. & POL. 261, 263-64 (2000).

63. Schwartz & Behrens, *supra* note 62, at 264.

Even beyond the innovation of a new product, manufacturers may decline to improve existing products because they are afraid that the improvements will lead to a jury's inference that the previous version of the same product was deficient or unsafe.⁶⁴ Rather than take that chance, they do not make the improvement.⁶⁵ And even while manufacturers hesitate to innovate new products or improve existing products, "certain older technologies have been removed from the market, not because of sound scientific evidence indicating lack of safety or efficacy, but because product liability suits have exposed manufacturers to unacceptable financial risks."⁶⁶

These lawsuits—both actual and potential—have a deleterious effect on a company's competitiveness by drawing resources away from innovation and production to legal defense. In 1995, an average product liability suit not involving an appeal was estimated to cost about \$70,000. If there is an appeal—as is almost certain when punitive damages are awarded—the cost could run as high as \$250,000 to \$1 million.⁶⁷ Under the American Rule for attorneys' fees, these costs are incurred whether the manufacturer wins or loses.⁶⁸ In 650 lawsuits against DuPont over Teflon materials in jaw implants, the company lost \$26 million in cases in which it *prevailed*.⁶⁹

Moreover, this "chilling effect" extends beyond product manufacturers. Former Secretary of Commerce Robert A. Mosbacher testified to Congress in

64. Jurors have long been known to exhibit hindsight bias. See generally Hal R. Arkes & Cindy A. Schipani, *Medical Malpractice v. the Business Judgment Rule: Differences in Hindsight Bias*, 73 OR. L. REV. 587 (1994); Susan J. LaBine & Gary LaBine, *Determinations of Negligence and the Hindsight Bias*, 20 L. & HUM. BEHAV. 501 (1996); Kim A. Kamin & Jeffrey J. Rachlinski, *Ex Post [is not equal to] Ex Ante: Determining Liability in Hindsight*, 19 L. & HUM. BEHAV. 89 (1995).

65. "Companies have no choice but to avoid the courtroom by withdrawing products, keeping others off the market, and restricting the scope of research and development . . ." Richard J. Mahony & Stephen E. Littlejohn, *Innovation on Trial: Punitive Damages Versus New Products*, 246 SCIENCE 1395, 1395 (1989).

66. Charles J. Walsh & Alissa Pyrich, *Rationalizing the Regulation of Prescription Drugs and Medical Devices: Perspectives on Private Certification and Tort Reform*, 48 RUTGERS L. REV. 883, 1035 n. 631 (1996) (citing AMA Board of Trustees, *Impact of Product Liability on the Development of New Medical Technologies*, 137 PROC. HOUSE OF DELEGATES 79). Even new technology has its skeptics: "The risks of older technology are known risks. Moreover, knowledge is widespread about how to use older technology most safely. New technology, by contrast, brings extra risks just because it is new, its hazards less foreseeable, and its safe use less knowable." Mark M. Hager, *Civil Compensation and its Discontents: A Response to Huber*, 42 STAN. L. REV. 539, 551 (1990).

67. Ronald Begley, *Product Liability; Even the Wins Are Costly*, CHEMICAL WK., Aug. 2, 1995, at 23.

68. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602 (2001) ("In the United States, parties are ordinarily required to bear their own attorney's fees—the prevailing party is not entitled to collect from the loser").

69. Begley, *supra* note 67, at 23.

1990 that, in some cases, universities are shying away from licensing patents to small manufacturers because of their fear that, as the originators of the idea upon which a product was manufactured, they will become the “deep pocket” if there is litigation involving the product.⁷⁰ Thus, many companies now regard product liability as a cost of doing business. The Goodman Equipment Corp., which makes underground mining locomotives and plastic blow-molding machinery and has sales of under \$50 million views product liability as a separate line item when considering the company’s financial health.⁷¹ “Even though Goodman has never gone to trial in a product liability case, [the company] calculates that gross product liability costs—insurance, settlement costs, out-of-pocket time, and legal fees—consume about 11 percent of the firm’s payroll.”⁷² American society benefits from innovation and should reward, not punish, innovators. The civil justice system should not be the anchor holding innovation still in flowing waters.

II. RESPONSIBILITY: THE FREEDOM TO MAKE PERSONAL CHOICES NECESSARILY DEMANDS PERSONAL RESPONSIBILITY FOR THE RESULTS OF THOSE CHOICES

With free will comes individual responsibility. Acceptance of individual autonomy and freedom means that one cannot externalize moral blame; instead, “one has the ability to consider and choose among various alternatives and must face, with full dignity, the consequences stemming from the chosen action.”⁷³ This ability to choose one’s own course “validates and gives purpose to human existence.”⁷⁴ Many world religions share this view.⁷⁵

70. *Hearing on S. 1400 Before the Consumer Subcomm. of the Senate Comm. on Commerce, Sci., and Transp.*, 101st Cong. 249 (1990) (statement of Secretary of Commerce Robert A. Mosbacher).

71. Daniel Gross, *Deflating Product Liability*, CFO, Apr. 1995, at 70.

72. *Id.*

73. See Rachel J. Littman, *Adequate Provocation, Individual Responsibility, and the Deconstruction of Free Will*, 60 ALB. L. REV. 1127, 1132 (1997).

74. See *id.* at 1133.

75. See Robert W. Lannan, *Catholic Tradition, and the New Catholic Theology and Social Teaching on the Environment*, 39 CATH. LAW. 353, 373 (2000) (discussing free will teachings in Catholicism); Damien P. Horgan, *Of Compassion and Capital Punishment: A Buddhist Perspective on the Death Penalty*, 41 AM. J. JURIS. 271, 276 (1996) (briefly examining Buddhism’s teachings on free will); Samuel J. Levine, *Playing God: An Essay on Law, Philosophy, and American Capital Punishment*, 31 N.M. L. REV. 277, 286 (2001) (discussing Judaism’s concept of free will). But see Thomas M. Franck, *Is Personal Freedom a Western Value?*, 91 AM. J. INT’L 593, 601 (1997) (explaining how Islam defines individuals by their adherence to the community).

A. Evolution of Tort Law from Personal Responsibility to Victim Mentality

Historically, many communities would stigmatize a member of their group who sued another member in tort.⁷⁶ Most accident victims did not look to the courts for their recovery; either they accepted their fate or sought to recover their damages informally.⁷⁷ Obviously, this is no longer the state of affairs. These days, communities expect people to sue if they suffer an injury of any magnitude. Accident victims want to “get theirs” because “everybody else is doing it.”⁷⁸ Many victims believe themselves entitled to recovery, and, if at all possible, eagerly transfer blame for their predicament away from themselves. They may find such lawsuit appealing as they are cast as the underdog against what they perceive as a huge, faceless corporation.⁷⁹

The media’s role in this transformation should not be underestimated. Certain newspapers, popular magazines, and television shows have placed victims in some personal injury cases in the national spotlight, allowing the plaintiffs to bask in their fifteen minutes of fame while the journalists rake the corporate defendants over the coals. For example, in 1990, CBS anchorwoman Connie Chung interviewed women who claimed to have autoimmune disease caused by breast implants.⁸⁰ “The broadcast implicitly blamed the FDA [Food and Drug Administration] for permitting hazardous medical devices to be sold.”⁸¹ An FDA advisory panel heard impassioned testimony from women who believed their implants made them ill. In April 1992, FDA Commissioner David Kessler banned breast implants for all purposes except in clinical trials of breast reconstruction after cancer surgery.⁸²

Two years later, the New England Journal Of Medicine published a retrospective cohort study from the Mayo Clinic finding no association between breast implants and 12 connective-tissue diseases.⁸³ An additional study in 1995

76. Stephen D. Sugarman, *Symposium on Law in the Twentieth Century: A Century of Change in Personal Injury Law*, 88 CAL. L. REV. 2403, 2409 (2000).

77. *Id.*

78. *Id.* at 2409-10.

79. *Id.* at 2410.

80. Peter J. Goss et al., *Clearing Away the Junk: Court-Appointed Experts, Scientifically Marginal Evidence, and the Silicone Gel Breast Implant Litigation*, 56 FOOD DRUG L.J. 227, 236 (2001) (noting that Connie Chung is credited for terrorizing millions of women with victim anecdotes).

81. Mark Herrmann, *From Saccharin to Breast Implants: Mass Torts, Then and Now*, 26 LITIGATION 50, 50 (1999).

82. *Id.* (citing Marcia Angell, *Shattuck Lecture—Evaluating The Health Risks Of Breast Implants: The Interplay Of Medical Science, the Law, and Public Opinion*, 334 NEW ENG. J. MED. 1513 (1996)).

83. Sherine E. Gabriel et al., *Risk of Connective-Tissue Diseases and Other Disorders After Breast Implantation*, 330 NEW ENG. J. MED. 1697 (1994); see also H. Berkel et al., *Breast Augmentation: A Risk Factor for Breast Cancer?*, 326 NEW ENG. J. MED. 1649 (1992).

reaffirmed the results.⁸⁴ By then, however, the implant manufacturer Dow Corning Corporation had filed for protection under Chapter 11 of the Bankruptcy Code.⁸⁵ The impact of these events is borne out by the numbers: In 1991, breast implant plaintiffs filed 137 lawsuits against Dow Corning; the next year saw 3500 lawsuits filed and by 1995, the year Dow Corning filed for bankruptcy, the company was defending more than 19,000 lawsuits.⁸⁶ Richard Hazleton, the Chairman and CEO of Dow Corning, wrote at the time that the company was facing "more than 75 trials, many with multiple plaintiffs, in a period of a few months. . . . [S]imultaneously fielding dozens of trial teams and witnesses to defend ourselves when settlement demands are unreasonable has become impossible."⁸⁷ Dow Corning was a \$2 billion company that provided jobs to more than 8,000 employees.⁸⁸ Thanks to a health "crisis" that, as it turns out, was little more than media-driven hysteria based on junk science, a thriving company was destroyed, taking with it all the livelihood of its employees, a devastating human cost when one considers the ripple effect through those employees' families contending with joblessness and uncertain prospects.⁸⁹

B. Personal Choices

Accidents happen. People sometimes do foolish things. These two statements would be wholly unremarkable except for one thing: some courts and legislatures do not believe that people should accept the consequences of their behavior. There is an increasing tendency toward victimhood in America, and a corresponding desire to assign blame for any misfortune to anyone but oneself. Phyllis Eisen, director of risk management for the National Association of Manufacturers, identifies both sides of the coin:

The underlying question is, what kind of risks are we willing to take and what kind of personal responsibility do people have to take in order to have a society that encourages risk? In truth, you can have a very cautious society where everyone's rights are protected to the hilt.

84. Jorge Sanchez-Guerrero et al., *Silicone Breast Implants and the Risk of Connective-Tissue Diseases and Symptoms*, 332 NEW ENG. J. MED. 1666 (1995); see also Heather Bryant & Penny Brasher, *Breast Implants and Breast Cancer—Reanalysis of a Linkage Study*, 332 NEW ENG. J. MED. 1535 (1995).

85. Herrmann, *supra* note 81, at 50.

86. Richard A. Hazleton, *The Breast Implant Controversy: Threats and Lessons for All of Us*, 65 VITAL SPEECHES OF THE DAY 114-18 (1998).

87. Richard Hazleton, *The Tort Monster That Ate Dow Corning*, WALL ST. J., May 17, 1995, at A19.

88. Sugarman, *supra* note 76, at 2409-10.

89. Cf. Andres Cowan, *Note: Scarlet Letters for Corporations? Punishment by Publicity Under the New Sentencing Guidelines*, 65 S. CAL. L. REV. 2387, 2391 (1992) (noting that fines for corporate wrongdoing may ultimately fall on relatively blameless consumers, shareholders, and employees).

But there is a much bigger loss on the other side. If a society is gaged ultimately on what it creates—and it is—whether its music, its art, its law, or its widgets, then there has to be some underlying encouragement for that creation. It doesn't happen by accident. You create an atmosphere that gives them that edge.⁹⁰

Unfortunately, the courtroom seems to hold higher promise to many people than the laboratory, and "personal responsibility" as a value, has declined in American esteem.

For example, a former member of the armed services sued several doctors at the Department of Veterans Affairs Medical Center, on a theory that the physicians did not do enough to assist her in making life changes—including quitting smoking and losing weight—that might have prevented her subsequent heart attack. The lawsuit alleges that the physicians knew she had "multiple risk factors to develop heart disease" but dismissed her symptoms as "basically normal and non-life threatening."⁹¹ She further alleges that the doctors failed to prescribe aggressive anti-cholesterol medication.

Automobile accidents have generated a substantial body of law which, in practice, absolve drivers from personal responsibility when their own negligence is coupled with alleged design defects. In thirty states, automobile manufacturers are not permitted to introduce evidence in court about whether a person injured or killed in an accident was wearing a seat belt.⁹² Even in many states with mandatory seat belt laws, jurors are not told of the plaintiff's disobedience of that law as evidence of at least some responsibility for the accident.⁹³ In South Carolina, a jury ordered DaimlerChrysler to pay a \$262.5 million judgment (\$250 million of which was punitive damages) in a case involving the tragic death of a six-year-old child.⁹⁴ Any mention of the mother's responsibility to her child and her own safety were kept from the jury. Jurors were not told that the mother

90. Tracy E. Benson, *Product Liability: Deep Waters To Debate*, INDUS. WK. 46, Aug. 6, 1990, at 46.

91. Terrie Morgan-Besecker, *Woman Suing VA Doctors*, WILKES-BARRE (PA.) TIMES-LEADER, Sept. 11, 2002, at 3A.

92. For example, Illinois, Indiana, Oklahoma, and Connecticut statutes provide that failure to wear a seat belt in violation of the statute shall not be considered negligence in any civil action nor limit or apportion damages. See CONN. GEN. STAT. § 14-100a(a)(4) (2001); 625 ILL. COMP. STAT. 5/12-603.1(c) (1993) ("Failure to wear a seat safety belt in violation of this Section shall not be considered evidence of negligence, . . . shall not diminish any recovery for damages arising out of the . . . operation of a motor vehicle."); IND. CODE § 9-19-10-7 (2002); OKLA. STAT. ANN. tit. 47 §12- 420 (West 2003).

93. Barry C. Bartel, *Tort Law and the Safety Belt Defense: Analysis and Recent Oregon Developments*, 26 WILLAMETTE L. REV. 517, 518 (1990) (stating that in some mandatory seat belt law states, courts may allow evidence of non-use to constitute negligence per se).

94. *Jimenez v. DaimlerChrysler Corp.*, 269 F.3d 439, 444 (4th Cir. 2001) (involving an accident where a child was killed when thrown from a Dodge Caravan when the liftgate latch unhitched upon collision).

caused the accident by running a red light,⁹⁵ or that the child was not wearing a seatbelt.⁹⁶

Criminals have also been known to sue for damages when their illegal enterprises take a wrong turn and the criminals themselves end up injured. One of the most notorious examples of this line of jurisprudence involved Emil Matasareanu, a bank robber responsible for the deadliest shooting spree in Los Angeles history. Wearing full body armor, Matasareanu and his partner Larry Phillips robbed a bank in North Hollywood. When the police closed in, the two men fired more than 1200 rounds with high-powered automatic weapons as they tried to get away. Nine police officers and two civilians were injured.⁹⁷ Phillips shot himself rather than be captured and Matasareanu was shot 29 times, dying on the scene from his injuries.⁹⁸ Subsequently, Matasareanu's mother and children sued the Los Angeles Police Department and individual police officers alleging violations of Matasareanu's civil rights and "wrongful death," alleging that Matasareanu was denied prompt medical care that would have saved his life.⁹⁹

95. *Id.* at 453 (affirming district court judge's exclusion of the red light evidence); *accord* Reed v. Chrysler Corp., 494 N.W.2d 224 (Iowa 1992) (determining that a plaintiff's negligence in causing an accident should not be considered in apportioning damages based on injuries that are enhanced as a result of a defective product); Andrews v. Harley-Davidson, Inc., 796 P.2d 1092 (Nev. 1990); *see also* Robert J. Eaton, *Automobile Safety: Transportation, Mobility, Safety and Fun*, 64 VITAL SPEECHES OF THE DAY 214-17 (1998). *But cf.* Whitehead v. Toyota Motor Corp., 897 S.W.2d 684 (Tenn. 1995) (citing Doupnik v. Gen. Motors Corp., 275 Cal. Rptr. 715 (3rd Dist. 1990)); Dahl v. BMW, 748 P.2d 77 (Or. 1987); Austin v. Ford Motor Co., 273 N.W.2d 233 (Wis. 1979); Keltner v. Ford Motor Co., 748 F.2d 1265 (8th Cir. 1984) (based on Arkansas law); Huffman v. Caterpillar Tractor Co., 645 F. Supp. 909 (D. Colo. 1986), *aff'd*, 908 F.2d 1470 (10th Cir. 1990) (based on Colorado law); Trust Corp. of Mont. v. Piper Aircraft Corp., 506 F. Supp. 1093 (D. Mont. 1981) (based on Montana law); Hinkamp v. Am. Motors Corp., 735 F. Supp. 176 (E.D.N.C. 1989), *aff'd*, 900 F.2d 252 (4th Cir. 1990) (based on North Carolina law). Note that in all of these cases, the courts allowed evidence of comparative negligence.

96. *Jimenez*, 269 F.3d at 455-56. The Fourth Circuit Court of Appeals held that the exclusion of the seatbelt evidence was not harmless error and reversed the judgment on that ground. *Id.* at 456.

97. *Whitfield v. Heckler & Koch, Inc.*, 98 Cal. Rptr. 2d 820, 824 (2000). Alas, certain police officers were not immune to the lure of judicial recovery either, and sued the weapons manufacturers for the injuries they suffered in the shoot-out. *Id.* at 823. The theory against the gun manufacturer of "negligent marketing," however, was rejected by the California Supreme Court in *Merrill v. Navegar*, 28 P.3d 116 (2001), and *Whitfield* was remanded for reconsideration in light of that case. 12 P.3d 1067 (Cal. 2000) (deferring action pending result in *Navegar*) and 40 P.3d 718 (Cal. 2001) (dismissing and remanding the case).

98. Jim Hill and Associated Press, *Lawsuit Accuses L.A. Police of Letting Wounded Gunman Die*, CNN (Feb. 28, 2002), at <http://www.cnn.com/2000/US/02/28/shootout.death/index.html>.

99. Jim Hill, *Family of Robber Killed in L.A. Shootout Sues*, CNN (Apr. 12, 1997), at <http://www.cnn.com/US/9704/12/bank.shootout.lawsuit/>; *see also* Matasareanu v. Williams, 183 F.R.D. 242 (C.D. Cal. 1998) (noting fact of suit and resolving issue relating to timing of service).

Other courts exhibit greater reticence to expand liability. For example, in *Epler v. Jansport*, a man wearing a jacket on a windy day accidentally snapped the elastic cord around the hood of the jacket and snapped himself in the eye.¹⁰⁰ Mr. Epler sued Jansport, the jacket's manufacturer, but the court rejected his theories of liability, noting three important points: First, Jansport had no record of any other similar incidents occurring with the jacket in question. The court held that just because some injuries may occur does not mean that a product is defective.¹⁰¹ Second, a user could avoid the dangers associated with the elasticized cord and cord locks by being mindful of the propensity of elastic cords to recoil and by exercising care by not pulling forcefully on such a cord in the vicinity of the user's face. Such care could reasonably be exercised even in adverse weather conditions.¹⁰² Finally, citing the general public's awareness of elasticized items such as rubber bands and bungee cords, the court assumed that average consumers are well acquainted with the tendency of all elastic items to recoil after they have been extended and released.¹⁰³

In Massachusetts, the Supreme Judicial Court dismissed the case of Joseph O'Sullivan, who was visiting his girlfriend's grandparents in Methuen and decided to dive into the shallow end of their pool. He had swum in the pool before so he knew its dimensions. An experienced swimmer and twenty-one years old at the time, O'Sullivan was not paralyzed but did crack two vertebrae and proceeded to sue the grandparents for negligence for not stopping him or providing warnings.¹⁰⁴ The trial court "correctly concluded that the open and obvious danger rule obviated any duty to warn the plaintiff not to dive headfirst into the shallow end of the defendants' swimming pool. Plain common sense . . . convince[s] us that this conclusion is indisputably correct."¹⁰⁵

In another example of a court applying common sense, in *Hansen v. PECO Energy Co.*,¹⁰⁶ a man got drunk at a bar and, while subsequently walking along some railroad tracks, decided to climb the catenary. Of course he ended up

In March, 2000, the judge declared a mistrial in the case after the jury hung, 9-3, in favor of the police. Jack Dunphy, *The LAPD Surrenders to the Feds*, NAT'L REV. ONLINE (Sept. 18, 2000), <http://www.nationalreview.com/comment/comment091800b.shtml>. The case was later settled with the City of Los Angeles and the complaint against the individual officers dismissed. E-mail from David Martin, Chairman, Law Enforcement Legal Defense Foundation (Oct. 3, 2002) (on file with author); see also David Rosenzweig, *Children Offer to Drop Suit in Robber's Death*, L.A. TIMES, June 20, 2000, at A1.

100. No. 00-CV-153, 2001 U.S. Dist. LEXIS 1890 (E.D. Pa. Feb. 22, 2001).

101. *Id.* at *10.

102. *Id.* at *14.

103. *Id.* at *15.

104. O'Sullivan v. Shaw, 726 N.E.2d 951, 953 (Mass. 2000).

105. *Id.* at 956. The court further noted that although the Legislature had abolished the "assumption of the risk" doctrine, the question of whether the danger was "open and obvious" went to whether the grandparents had a duty to the plaintiff. The court held that they did not. *Id.* at 958.

106. No. 98-1555, 1999 U.S. Dist. LEXIS 13388 (E.D. Pa. Aug. 25, 1999), *aff'd in unpublished decision*, 229 F.3d 1138 (3rd Cir. 2000).

electrocuting himself on the high voltage wires, but rather than thanking his lucky stars that he was still alive, he sued the railroad for negligence in failing to make the catenary inaccessible.¹⁰⁷ He argued that the railroad should have foreseen that a young adult like himself (aged 20 at the time of the accident) would be attracted to it.¹⁰⁸ Moreover, he even argued that his drunken state was not his fault, because the bar had illegally served him (as he was underage).¹⁰⁹ These attempts to distance himself from his own blameworthy conduct did not sway the judge: "Such reasoning, however, cannot excuse Plaintiff from accepting responsibility for his own conduct. . . . Plaintiff did have a choice in this matter—he should not have climbed the structure."¹¹⁰

These cases reflect the mental state, increasingly common among plaintiffs, that

if a real or perceived ill befalls me at any point in society, well, there has to be a legal cause of action, there has to be a remedy, there has to be a bureaucrat to make me feel better, there has to be a regulation, and there has to be money in my pocket.

This mind-set, all too often rewarded by courts and juries, has tremendous costs, not only in dollars paid to individuals who suffer the consequences of foolish acts, but also to society as a whole.

Beyond taking responsibility for simply foolish acts, freedom-loving Americans should be entitled to make choices about the level of safety risk they are willing to accept. For example, the more safety devices an automobile manufacturer installs in a particular model, the more expensive the car. Manufacturers therefore choose to make some safety devices optional.

The consumer theoretically was aware of the optional safety device and, after making a similar conscious or unconscious cost-benefit analysis, elected to forgo purchasing the device. The consumer apparently possessed more knowledge as to his or her needs, the amount of money available, or the ultimate use of the product as evinced by the consumer's rejection of the options. The manufacturer did not and could not possess knowledge of the consumer's purchasing criteria. Considering current technology, there is no possible way a manufacturer can read a consumer's mind to ascertain each individual's needs, and until there is a way to do this, the manufacturer must at some point be able to rely on the decisions a consumer makes. Therefore, the manufacturer's decision to offer optional safety equipment appears eminently reasonable, as the manufacturer is unaware of the ultimate

107. *Id.* at *2-3.

108. *Id.* at *3.

109. *Id.* at *16.

110. *Id.* at *18; see also Shannon P. Duffy, *Being Drunk Doesn't Excuse Trespass*, THE LEGAL INTELLIGENCER (Sept. 1, 1999).

needs of the consumer.¹¹¹

People, especially those in low-income brackets, are frequently willing to trade some safety features for a less expensive vehicle. When people cannot afford the safest (and more expensive) vehicle, they should be permitted to choose between a somewhat less safe car and no car at all.

Poor consumers have more pressing needs for their current income—another reason they are less likely to spend it to protect their future income. In other words, it is rational for poorer consumers to bear risks that wealthier consumers will pay to mitigate. Courts that refuse to credit a consumer's willingness to assume risk are often forcing a wealthy person's set of preferences on the poor. In doing so they impoverish the most needy consumers, who already spend a larger percentage of their income on consumer goods than do the rich.

If unable to purchase anything but the highest quality, many poorer consumers will choose not to purchase at all.¹¹²

An individual forced to forego car ownership because it has been priced out of his reach will require public transportation, which often has its own safety issues.¹¹³ Some courts, however, are unwilling to allow individuals to make this choice, instead imposing on automobile manufacturers a duty *in tort*¹¹⁴ to provide

111. Thomas E. Powell, II, *Products Liability and Optional Safety Equipment - Who Knows More?*, 73 NEB. L. REV. 844, 845-46 (1994).

112. Michael I. Krauss, *Restoring the Boundary: Tort Law and the Right to Contract*, 347 CATO INST. POL'Y ANALYSIS 11 (June 3, 1999).

113. Women are more dependent on public transportation than men. Nicole Stelle Garnett, *The Road from Welfare to Work: Informal Transportation and the Urban Poor*, 38 HARV. J. ON LEGIS. 173, 191 (2001). Women are more likely than men to be victimized—or fear being a victim—on public transit, and are more likely to respond by refusing to ride public transit, even if this means forgoing travel altogether. *Id.* at 191-92. Moreover, danger often awaits public transit riders while waiting at, and walking to and from, transit stops. *Id.*

114. The important topic of regulation through litigation is beyond the scope of this Article. For an overview, see Richard C. Ausness, *Tort Liability for the Sale of Non-defective Products: An Analysis and Critique of the Concept of Negligent Marketing*, 53 S.C. L. REV. 907, 857-59 (2002); Richard L. Cupp, Jr., *State Medical Reimbursement Lawsuits After Tobacco: Is the Domino Effect for Lead Paint Manufacturers and Others Fair Game?*, 27 PEPP. L. REV. 685 (2000); William H. Pryor, Jr., *State Attorney General Litigation: Regulation Through Litigation and the Separation of Powers*, 31 SETON HALL L. REV. 604 (2001); Victor E. Schwartz & Leah Lorber, *State Farm v. Avery: State Court Regulation Through Litigation Has Gone Too Far*, 33 CONN. L. REV. 1215 (2001); Robert A. Levy, *Turning Lead Into Gold*, LEGAL TIMES, Aug. 23 & 30, 1999, at 21 (“[A] threat to the rule of law is that many states and cities are resorting to government-sponsored litigation to achieve what they could not do through the legislative process, thus violating the principle of separation of powers—a centerpiece of the federal constitution and no less important at the state level.”).

certain safety features.¹¹⁵ This may have the perverse result of forcing the safest possible product from the market entirely, because it is simply too expensive to include every safety precaution.¹¹⁶

In *Geier v. American Honda Motor Co.*,¹¹⁷ Alexis Geier was driving a 1987 Honda Accord in Washington, D.C. and, although wearing a lap belt and shoulder harness, she suffered serious head injuries when her car spun out of control and struck a tree. She sued Honda for negligence, breach of warranty, and strict products liability, arguing that if the car had a driver's side airbag, she would not have been seriously injured. When Ms. Geier's car was made in 1987, airbags were not mandatory under federal law, but was one of several passive restraint opinions from which car manufacturers could choose to comply with federal standards.¹¹⁸ The Supreme Court considered whether the Federal Motor Vehicle Safety Standard ("FMVSS"),¹¹⁹ which did not require the 1987 Honda in question to come equipped with passive restraints, preempted the plaintiff's action.¹²⁰ The FMVSS contains an express preemption provision providing that

115. Whether created by evolving tort law or by regulations, mandatory safety features inevitably increase the cost of automobiles. In the early 1960s, the very popular original Volkswagen Beetle weighed only 1800 pounds (compared to 3995 for the "wide-track Pontiac"), and had no air bags, no "crumple zones," no five-mph bumpers, no computers, and no emissions controls. It cost \$3000. When it was no longer technically or economically feasible to comply with the increasing number of federal regulations, Volkswagen took the Beetle off the market in 1979. When the "new Beetle" returned in 1998, it had front-wheel drive, a water-cooled motor, airbags, an anti-lock braking system, an engine with complicated computer controls, and a cost of \$16,500 to \$20,000. Eric Peters, *The Lost Bug*, NAT'L REV., Feb. 9, 1998. By 2002, the New Beetle Turbo S had a list price of \$23,400. James G. Cobb, *This Bug Says, "Step on It,"* N.Y. TIMES, June 9, 2002, at L1. By contrast, in Mexico, the old Beetle never went out of production and was available in 2001 for an average of \$7800. The Mexican Beetle meets Environmental Protection Agency emissions standards but not noise level standards and it does not have air bags. Tessie Borden, *New Beetle? Mexicans Never Let Go of the Beloved Original*, SEATTLE TIMES, Apr. 13, 2001, at F1.

116. See, e.g., *Brown v. Super. Ct. of San Francisco*, 751 P.2d 470 (Cal. 1988) (discussing the rising prices and restricted availability of prescription drugs and citing as an example, Bendectin, the only antinauseant drug available for pregnant women, which was withdrawn from sale in 1983 because the cost of insurance almost equaled the entire income from sale of the drug. Before it was withdrawn, the price of Bendectin increased by over 300%). See also *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479 (Cal. 1990), *cert. denied*, 49 U.S. 936 (1991).

If the use of cells in research is a conversion, then with every cell sample a researcher purchases a ticket in a litigation lottery. Because liability for conversion is predicated on a continuing ownership interest, 'companies are unlikely to invest heavily in developing, manufacturing, or marketing a product when uncertainty about clear title exists.

Id. at 496.

117. 529 U.S. 861 (2000).

118. *Id.* at 864-65.

119. 15 U.S.C. §§ 1381-1431 (1966), now codified at 49 U.S.C. §§ 30101-30169 (2000).

120. *Geier*, 529 U.S. at 866.

no State shall have any authority to establish any safety standard applicable to the same aspect of performance of such vehicle which is not identical to the Federal standard.¹²¹ The FMVSS also contains a “savings clause,” which provides that compliance with a federal safety standard does not exempt any person from liability under common law.¹²² The Court concluded that a state tort action which actually conflicted with the federal statute—as Geier’s tort claim did—would be preempted by the federal statute.¹²³

This type of tort claim, if successful, would impose massive liability on automobile manufacturers for a decision to install some other passive restraint system (e.g., automatic seatbelts) rather than airbags. A tort judgment against the manufacturer would have the same effect on the car makers as a state statute or regulation requiring airbags in all vehicles.¹²⁴ The extent of automotive safety features is a policy matter and it is a misuse of the tort system to use the courts to determine safety standards for the performance of a vehicle or item of equipment. This is especially true when the legislative branch of government has already enacted safety regulations intended to preserve a certain amount of flexibility and choice.¹²⁵

Most parents try to teach their children that actions have consequences. If you stand on a chair to reach the cookie jar on a high shelf, you might fall and get hurt. The child is expected to learn these lessons and, as he grows older and ventures further from parental supervision, is expected to exercise enough self-discipline to avoid placing himself in harm’s way. Moreover, if the child deliberately made the wrong choice, parents often respond, “well, it was your own fault for climbing when you know you shouldn’t; don’t come crying to me.” These days, however, the trial lawyers and some courts are teaching an entirely different lesson. “Oh you poor child!” they exclaim, “you’ve fallen and scraped your knee. It must be the chair manufacturer’s fault—he should have foreseen you would climb to get the cookies and built a sturdier chair. Let’s sue’em! And here you go, dear, have a cookie.”

When people are unwilling to take responsibility for their choices, they are

121. *Id.* at 867.

122. *Id.* at 868.

123. *Id.* at 874-75. Compliance with safety standards will not always save a manufacturer from punitive damages. In *Anderson v. General Motors*, a Los Angeles jury voted for a \$5 billion verdict (later reduced to \$1.2 billion) against General Motors for the allegedly defective design of its 1979 Chevrolet Malibu. Appeal currently pending in California Court of Appeals for the Second Appellate District, Division Four, Docket No. B135147. In that case, the plaintiffs’ attorneys successfully prevented General Motors from telling the jury that the accident had been caused by a drunk driver who rammed their van at seventy mph, and who had been convicted of a felony and imprisoned over the accident; or that the Malibu’s real-life crash statistics showed it to be safer than the average car of its era; or that the alternative crash design proffered by plaintiffs raised safety concerns of its own and was not widely used by other manufacturers. Appellant’s Opening Brief (filed Dec. 4, 2000) at 4-10 (copy on file with author).

124. *Harris v. Ford Motor Co.*, 110 F.3d 1410, 1415 (9th Cir. 1997).

125. *Id.* at 1412.

really saying that they do not want to be free. A free society can only exist when people accept the consequences of their own actions rather than seeking to place the blame on others. The shifting of responsibility to a third party is especially harmful to society when the target for blame is chosen solely because of its financial solvency. This “deep pockets” approach to tort litigation drives up the costs of products for everyone, as companies pass the costs of the damage awards on to consumers.

III. RISK: WHEN INDIVIDUALS HAVE THE FREEDOM TO MAKE CHOICES, AND ASSUME THE RESPONSIBILITY FOR THOSE CHOICES, THEY SHOULD BE ABLE TO ASSUME THE LEVEL OF RISK THEY FIND PERSONALLY ACCEPTABLE

Tort liability is intended to reduce the consumption of risky products (i.e., those with a greater likelihood of causing injury) by increasing their prices and thereby discouraging people from buying them.¹²⁶ This objective assumes that consumers tend to underestimate the risks associated with various products.¹²⁷ Price increments reflecting manufacturers’ liability insurance costs remind consumers that the products are associated with certain risks; without such reminders, consumers will purchase relatively risky products in greater volume.¹²⁸ Lower consumption of risky products is likely to result in fewer accidents, thereby reducing the cost to society of paying for accidents.¹²⁹

126. Prices increase as manufacturers pass through the cost of liability verdicts to consumers. See Robert F. Cochran, Jr., *From Cigarettes to Alcohol: The Next Step in Hedonic Product Liability?*, 27 PEPP. L. REV. 701, 714 (2000) (“When manufacturers pass these costs to consumers, the price of products will more nearly reflect the costs that the products create to society, and consumers will be forced, through the higher prices, to take into consideration the losses that those products cause”).

127. See CASS L. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE 181 (2002) (“One of the most well-established results in the literature on risk and uncertainty is that people overestimate low-probability events and underestimate larger risks.”); see also *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 83 (N.J. 1960) (“[u]nder modern conditions the ordinary layman, on responding to the importuning of colorful advertising, has neither the opportunity nor the capacity to inspect or to determine the fitness of an automobile for use . . .”).

128. See Note, *Tort as a Debt Market: Agency Costs, Strategic Debt, and Borrowing Against the Future*, 115 HARV. L. REV. 2294, 2295 (2002) (“a consumer is sold ‘tort insurance’ by paying higher prices ex ante and receiving a tort award in the case of an accident”).

129. See James A. Henderson, Jr., *Judicial Reliance on Public Policy: An Empirical Analysis of Products Liability Decisions*, 59 GEO. WASH. L. REV. 1570, 1579 (1991); see also David G. Owen, *The Moral Foundations of Products Liability Law: Toward First Principles*, 68 NOTRE DAME L. REV. 427, 476 (1993) (A consumer who puts a “product to a uniquely adventuresome use that he should know may exceed the product’s capabilities . . . has no fair claim to compensation from the maker, diminishing the autonomy of the maker’s owners and other consumers, because the accident was caused by the victim’s greed in demanding greater usefulness from the product than other consumers sought and greater usefulness than was reflected in the price he paid.”).

“Risk” is not the same thing as “hazard” or “danger.” Dangers are experienced as a given that exists in the world (e.g., earthquakes, sheer cliffs, and natural disasters).¹³⁰ The idea of risk, however, is bound up with the aspiration to control, and particularly with the idea of controlling, the future.¹³¹ Risk is always related to security and safety.¹³² It is also always connected to responsibility. Although the word “responsible” is much older, “responsibility” first appeared in the English language in the late Eighteenth Century,¹³³ and coincides with the rise of modern political and legal thought. As it is used today, someone who is responsible for an event can be said to be the author of that event. This is the original sense of “responsible,” which links it with causality or agency.¹³⁴ Another meaning of responsibility is where we speak of someone being responsible if he or she acts in an ethical or accountable manner.¹³⁵ The

130. See generally Denis Binder, *Act of God? or Act of Man?: A Reappraisal of the Act of God Defense in Tort Law*, 15 REV. LITIG. 1, 3 (1996) (noting the 300 year history of the “Act of God” defense to negligence and strict liability tort actions).

131. See Anthony Gidders, *Risk and Responsibility*, 62 MOD. L. REV. 1, 3 (1999) (U.K.).

132. See, e.g., Thomas O. McGarity, *Seeds of Distrust: Federal Regulation of Genetically Modified Foods*, 35 U. MICH. J.L. REF. 403, 406-426 (2002) (discussing risks and benefits of genetically modified foods); Margaret Gilhooley, *Deregulation and the Administrative Role: Looking at Dietary Supplements*, 62 MONT. L. REV. 85, 130 (2001) (noting that, with regard to dietary supplements, “the potential to cause serious harm is a risk against which the public needs and, presumably, still wants protection”).

133. See Gidders, *supra* note 131, at 3. The earliest use of “responsibility” noted in the Oxford English Dictionary is by Alexander Hamilton in *The Federalist Papers* No. 63 (1787) (“Responsibility in order to be reasonable must be limited to objects within the power of the responsible party”). 8 OXFORD ENGLISH DICTIONARY 742 (John Simpson & Edmund Weiner eds., 2d ed. 1989). The word “responsible” appears at least as early as the Magna Carta, in 1215. See Magna Carta Preamble at ¶4 (1215), at <http://www.constitution.org/eng/magnacar.htm> (last visited Oct. 8, 2002). Courts have a long-standing practice of referring to dictionaries to determine the plain meaning of words. When construing statutory provisions and in determining what Congress meant by certain language, the Supreme Court generally consults dictionaries from the time the statute was enacted. See, e.g., *Molzof v. United States*, 502 U.S. 301, 307 (1992); *Reves v. Ernst & Young*, 494 U.S. 56, 77 (1990) (Rehnquist, C.J., concurring in part and dissenting in part) (citing “contemporaneous editions of legal dictionaries” to define “maturity” as used in the Securities Exchange Act of 1934); *Regents of Univ. of Cal. v. Public Employment Relations Bd.*, 485 U.S. 589, 598 (1988) (giving statutory language “its normal meaning” and citing a dictionary “from the period during which the [statutory provision] was enacted”). In *United States v. Ramsey*, 431 U.S. 606 (1977) (Stevens, J., dissenting), construing the term “envelope” contained in an Act enacted in 1866 (dealing with authority of customs officials), Justice Stevens stated, “[c]ontemporary American dictionaries emphasize the usage of the word as descriptive of a package or wrapper as well as an ordinary letter.” *Id.* at 629-30, quoted in Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court’s Use of Dictionaries*, 47 BUFFALO L. REV. 227, 267-68 (1999).

134. 8 OXFORD ENGLISH DICTIONARY, *supra* note 133, at 742.

135. *Id.*

most relevant definition of responsibility with relation to risk in the tort context, however, is "obligation," or "liability."¹³⁶

The relation between risk and responsibility depends on whether people can make decisions to alter the outcome of events. Both concepts presume the ability to decide on a course of action.¹³⁷ What brings into play the notion of responsibility is that someone makes a decision having discernible consequences.¹³⁸ As people perceive themselves as safer or better equipped against a danger, they are more likely to take more risks.¹³⁹ For example, regarding the increasing voluntary use of ski helmets, Jasper Shealy, a ski injury expert at the Rochester Institute of Technology in New York believes that some fatalities were caused by people who took risks they otherwise wouldn't have taken because the helmets made them overconfident. "I've heard several people say, 'I only wear my helmet when I ski through the trees.' People think, 'I can do things I normally wouldn't want to do because I'm wearing a helmet.'"¹⁴⁰

The word "foreseeability" commonly is used to describe "actual, subjective awareness of possible future occurrences."¹⁴¹ It connotes a consciousness of—and ability to plan for—future possibilities.¹⁴² A foresighted person considers the future and takes necessary precautions to protect himself (and others) from risks while taking advantage of opportunities.¹⁴³ Thus, foreseeability is an integral part of prudent human behavior.

To the extent that we expect humans to be rational beings, they must be charged with some degree of foreseeability. In the context of moral analysis, the meaning of foreseeability derives from its relationship to the concepts of choice and fault. If an actor foresees a possible consequence harmful to himself or others and, disregarding this foresight, acts in a way which allows the avoidable harm to occur, his action would be condemned as morally blameworthy. He would be said

136. See Gidders, *supra* note 131, at 7-8.

137. In the medical malpractice context, Americans, as well as Canadians and the British are viewed as increasingly refusing to accept risk, and its consequences, as a part of life. Instead, they seek to shift responsibility to medical service providers and product manufacturers. See Michael J. Trebilcock et al., *Malpractice Liability: A Cross-Cultural Perspective*, in *TORT LAW AND THE PUBLIC INTEREST: COMPETITION, INNOVATION, AND CONSUMER WELFARE* 205, 216 (Peter H. Schuck ed., 1991), cited in Wilson, *supra* note 18, at 509 & n.23.

138. See Gidders, *supra* note 131, at 8.

139. John Adams, *Cars, Cholera and Cows: The Management of Risk and Uncertainty*, *CATO INST. POL'Y ANALYSIS* 6 (Mar. 4, 1999).

140. Stephanie McKinnon McDade, *Heads Up*, *SACRAMENTO BEE*, Jan. 19, 2000, at G1, G5.

141. Banks McDowell, *Foreseeability in Contract and Tort: The Problems of Responsibility and Remoteness*, 36 *CASE W. RES. L. REV.* 286, 290 (1985).

142. *Id.*

143. *Id.* (citing 4 *OXFORD ENGLISH DICTIONARY* 440 (1933) (defining "foresee" as the ability "to see beforehand, have prescience of [or] to exercise foresight, take care or precaution, make provision").

to be at fault. When we condemn someone for harming another, we may be saying he failed to foresee a happening when he should have, or he foresaw the event and made a bad choice.¹⁴⁴

In a world that is not risk-free and never will be, a purchaser is in a position to avoid certain types of harm. The consumer is free to choose whether or not to purchase a product in the first place. Then, after purchase, the consumer exercises control over the product, choosing whether to follow (or even whether to read) the instructions and warnings that accompany it.¹⁴⁵ Moreover, only the consumer is aware of his or her own peculiar needs and abilities, thus placing him in a better position to insure against injury (or to choose to live dangerously). Some individuals may make a conscious choice to misuse a product. Recognizing this fact, Arizona¹⁴⁶ and North Carolina¹⁴⁷ enacted a statutory defense for the use of products contrary to their "express and adequate instructions or warnings . . . if the user knew or with the exercise of reasonable and diligent care should have known of such instructions or warnings."¹⁴⁸ It is in the public interest to recognize that some injuries are not most effectively dealt with by having their cost spread among consumers through higher prices and insurance.¹⁴⁹

144. McDowell, *supra* note 141, at 290 (internal citations omitted). In *Moran v. Faberge, Inc.*, 332 A.2d 11, 26 (Md. 1975) (O'Donnell, J., dissenting), Judge O'Donnell observed:

It seems to me that the majority has fallen into the pitfall, recognized by Professor Prosser, who, in undertaking to analyze the treatment by the various courts of the illusory concept of "foreseeability" and noting the confusion resulting therefrom, states:

"Some 'margin of leeway' has to be left for the unusual and the unexpected. But this has opened a very wide door; and the courts have taken so much advantage of the leeway that it can scarcely be doubted that a great deal of what the ordinary man would regard as freakish, bizarre, and unpredictable has crept within the bounds of liability by the simple device of permitting the jury to foresee at least its very broad, and vague, general outlines."

Id. at 26 (quoting W. PROSSER, TORTS § 43, at 269 (4th ed. 1971)).

145. Michigan Lawsuit Abuse Watch (MLAW) sponsors the annual "Wacky Warning Label Contest" to reveal how lawsuits, and concern about potential lawsuits, have created a need for common sense warnings on many of the products consumers use every day. Among the "winners" in 2001 were the fireplace log with the warning, "Caution: Risk of Fire"; the box of birthday candles labeled, "DO NOT use soft wax as ear plugs or for any other function that involves insertion into a body cavity"; and the CD player with the unusual warning, "'Do not use the Ultradisc2000 as a projectile in a catapult.'" Press Release, MLAW, Warning That "Fireplace Log May Cause Fire" Wins Award in Fifth Annual Contest of Nation's Wackiest Labels (Jan. 22, 2002), at <http://www.mlaw.org> (last visited Oct. 8, 2002).

146. See ARIZ. REV. STAT. ANN. 12-683(3) (West 1992).

147. See N.C. GEN. STAT. 99B-4(1) (1999).

148. *Id.*, cited in David G. Owen, *Products Liability: User Misconduct Defenses*, 52 S.C. L. REV. 1, 6 (2000).

149. See generally Owen, *supra* note 129, at 427 (discussing a variety of "misuse" defenses).

Manufacturers cannot guard against or prevent *all* hazards. For example, in *Romito v. Red Plastic Co.*,¹⁵⁰ a construction worker who failed to tie himself to a safety line died when he accidentally fell through a skylight. His family brought a products liability action against the skylight manufacturer under negligence and strict liability theories. The California Court of Appeal rejected the claim:

We acknowledge the appeal of the logic that Dur-Red, in the interest of public safety, readily could have used a stronger material at no extra cost that would have saved Romito's life. This logic, however attractive in this case, fails to satisfy our broader policy concerns. Any product is potentially dangerous if accidentally misused or abused, and predicting the different ways in which accidents can occur is a task limited only by the scope of one's imagination. To require skylight manufacturers to adopt technological safety advances and recall, replace, or retrofit their older products or risk exposure to tort liability would be unreasonable in the absence of defined risks of harm. . . .

Here, the injury resulted from an accidental fall. If we were to impose a duty of care in this situation, should the manufacturer also owe a duty of care to a victim of crime? As the level of violence in modern society increases, even state of the art products may soon be rendered unsafe. For example, automobile windshields and home and office windows could be made of bulletproof glass but most are not. Must glass companies refuse to sell anything but bulletproof glass to auto manufacturers and construction companies simply because the stronger material exists and the risk of shootings is ever increasing in many urban neighborhoods?¹⁵¹

Other types of injury may impose such substantial society costs that a legislature may legitimately curtail personal freedom. For example, motorcycle helmet laws were fiercely debated as legislators attempted to strike a balance between the competing interests of riders who valued the personal freedom of riding without a helmet with the societal value of saving taxpayer dollars used to support uninsured riders who had accidents and suffered head injuries, requiring long-term care. See, e.g., *Picou v. Gillum*, 874 F.2d 1519, 1522 (11th Cir. 1989):

A motorcyclist without a helmet is more likely to suffer serious head injury than one wearing the prescribed headgear. State and local governments provide police and ambulance services, and the injured cyclist may be hospitalized at public expense. If permanently disabled, the cyclist could require public assistance for many years. As Professor Tribe has expressed it, "in a society unwilling to abandon bleeding bodies on the highway, the motorcyclist or driver who endangers himself plainly imposes costs on others."

150. 44 Cal. Rptr. 2d 834, 838 (1995), *rev. denied*, 1995 Cal. LEXIS 7120 (Cal. Nov. 22, 1995).

151. *Id.*

Some injuries are better borne or avoided by the consumer.¹⁵²

If courts develop tort law to further the public policy of improving overall safety, they cannot escape the need to address comparative risk.¹⁵³ The "abatement of risk in one area sometimes comes only with unintended effects that actually may increase other sorts of risk."¹⁵⁴ "Every form of transportation, medical treatment, or food storage involves some risks, and it is worse than useless to do away with one hazard in ways that push society toward more hazardous substitutes."¹⁵⁵ As an example of this type of application of the law of unintended consequences, consider that the silicon breast implant litigation reduced the availability not only of breast implants,¹⁵⁶ but also of shunts made of silicon used to divert excess water from the brains of children with hydrocephalus.¹⁵⁷ Thus, if safety rules render air travel overly expensive, more vacationers will drive; if the government shuts down nuclear power generators, there will be more underground coal mining.¹⁵⁸

152. *Seely v. White Motor Co.*, 403 P.2d 145, 150 (Cal. 1965) ("If under these circumstances defendant is strictly liable in tort for the commercial loss suffered by plaintiff, then it would be liable for business losses of other truckers caused by the failure of its trucks to meet the specific needs of their businesses, even though those needs were communicated only to the dealer. Moreover, this liability could not be disclaimed, for one purpose of strict liability in tort is to prevent a manufacturer from defining the scope of his responsibility for harm caused by his products.").

153. See Walter K. Olson, *Comparative Risk*, MANHATTAN INSTITUTE CIVIL JUSTICE MEMO NO. 1 (1987), at http://www.manhattan-institute.org/html/cjm_1.htm (last visited Oct. 8, 2002).

154. Richard Nagareda, *Outrageous Fortune and the Criminalization of Mass Torts*, 96 Mich. L. Rev. 1121, 1196 (1999) (citing John D. Graham & Jonathan Baert Wiener, *Confronting Risk Tradeoffs*, RISK VERSUS RISK: TRADEOFFS IN PROTECTING HEALTH AND THE ENVIRONMENT 1, 10-19 (John D. Graham & Jonathan Baert Wiener eds., 1995)).

155. See Olson, *supra* note 153.

156. See *supra* notes 81-84 and accompanying text.

157. See Nagareda, *supra* note 154, at 1196 (citing Linda Ransom, *Lawyers May Kill My Daughter*, WALL ST. J., Mar. 20, 1996, at A14).

158. See Olson, *supra* note 153. This is not to suggest that the general public has a perfect record of risk-assessment. As one commentator notes, the Three Mile Island incident is instructive regarding public perception of risk:

Despite the fact that not a single person died at Three Mile Island, and few if any latent cancer fatalities are expected, no other accident in our history has produced such costly societal impacts. The accident at Three Mile Island devastated the utility that owned and operated the plant. It also imposed enormous costs (estimated at 500 billion dollars by one source) on the nuclear industry and on society, through stricter regulations, reduced operations of reactors worldwide, greater public opposition to nuclear power, reliance on more expensive energy sources, and increased costs of reactor construction and operation.

Robert Wachbroit, *Describing Risk*, RISK ASSESSMENT IN GENETIC ENGINEERING 370 (Morris Levin & Harlee S. Strauss eds., 1991) (quoting P. Slovic, *The Perception and Management of Therapeutic*

For example, trial lawyers have attacked every major form of contraception in product liability lawsuits,¹⁵⁹ including options that are well-known to be very safe.¹⁶⁰ As a result, research funding has evaporated, especially within the for-profit sector.

American companies spent a mere twenty-two million on contraceptive research in 1995, a year in which Americans spent \$2.9 billion on birth control products. Only two American for profit companies, Ortho and Wyeth-Ayerst, continue to fund significant research on contraceptive development. Instead, nearly all birth control research is now carried out by philanthropic entities; the three nonprofits active in the area, together with the National Institute of Health, have a total contraceptive research budget of about \$50 million, less than one-fifth of what it ordinarily takes to bring a single new drug to market.¹⁶¹

The impact on medical care goes well beyond contraception. For example, physicians serving rural areas are not allowed to contract with patients for a lower level of care than that available to wealthy patients in more prosperous locales.¹⁶² Stripped of the ability to contract for services, and wary of malpractice suits, many rural physicians refuse to engage in obstetrical practice. Women in labor are forced to drive hours to the nearest big city hospital, risking delivery—or miscarriage—en route.¹⁶³

Risk 10 (1989) (unpublished paper presented to Royal College of Physicians) *quoted in* Burk & Boczar, *supra* note 36, at 837 n.286 (1994). “[T]he introduction of new nuclear power facilities has been brought to a standstill without any legislative prohibitions or deterrents, but rather by harassment, agitation, and litigation spawned by opposition groups whose efforts have made nuclear power ‘too hot to handle’ in the political arena.” Harold P. Green, *The Law-Science Interface in Public Policy Decisionmaking*, 51 OHIO ST. L.J. 375, 399 (1990), *quoted in* Burk & Boczar, *supra* note 36, at 837 n.286.

159. See generally William M. Brown, *Deja Vu All Over Again: the Exodus from Contraceptive Research and How to Reverse It*, 40 BRANDEIS L.J. 1 (2001) (“Contraceptive research has been stalled for a generation in the United States. Pharmaceutical and medical device companies have left the business in droves and only a few remain. A major reason for the exodus has been the cost of defending the many product liability lawsuits the companies have faced”).

160. *Id.* at 26-29 (detailing litigation against the Pill, spermicidal jellies, IUDs, and Norplant).

161. Marc M. Arkin, *Products Liability and the Threat to Contraception*, Civil Justice Memo No. 36, Center for Legal Policy at the Manhattan Institute (Feb. 1999), available at http://www.manhattan-institute.org/html/cjm_36.htm (last visited Mar. 13, 2003).

162. Michael I. Krauss, *Restoring the Boundary: Tort Law and the Right to Contract*, 347 CATO INST. POL’Y ANALYSIS 10 (June 3, 1999) (citing *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972); *Kalsbeck v. Westview Clinic PA*, 375 N.W.2d 861 (Minn. Ct. App. 1985); and *Roberts v. Tardiff*, 417 A.2d 444 (Me. 1980) (obstetrical treatment of mother did not attain nationally recognized standards of care)).

163. John Porretto, Associated Press, *Costs Lead Rural Doctors to Drop Obstetrics*, WASH. POST, Nov. 23, 2001, at A4 (insurance companies responded to Mississippi’s reputation for “jackpot justice” by substantially increasing medical malpractice premiums to between \$40,000 and

All human activity carries risk. Given the destructive potential of modern technology, the prospective ambit of that danger can be enormous. Drawing the liability boundary to include all outcomes bearing simple cause-in-fact relationships to the defendant will have dire economic consequences. If defendants must pay judgments from personal assets, many individuals and small businesses may be forced out of the market or into bankruptcy. Fear of this possibility may compel entrepreneurs and individuals to act very cautiously, becoming risk-averse rather than risk-preferring.¹⁶⁴

If we are to treat adults as adults, they must be permitted to assess and accept risks dependent on their own level of risk-aversion. Courts should neither act as though adults have the cognitive capacity of children, nor should they try to impose a risk-free society. Risk moves hand-in-hand with both freedom and responsibility; our tort system must balance all three, while eradicating none.

IV. TORT REFORM PROPOSALS SHIFT THE BALANCE FROM LIABILITY IMPOSED BY JUDICIAL FIAT TO PERSONAL FREEDOM AND RESPONSIBILITY TO ASSESS AND ACCEPT RISK

As much as this Article has described the impacts of expansive tort liability on free enterprise, it is with a certain wry irony that one must note the emergence of a new entrepreneurial sector: the phenomenon of entrepreneurial litigation.¹⁶⁵ Professor Richard Nagareda explains that these lawsuits initially required huge infusions of cash over many years to enable the plaintiff's bar to generate the documentary evidence and expert witnesses needed to substantiate their tort claims.¹⁶⁶ The successful claims then repay the initial investment many times over through a percentage of the clients' damages (especially when punitive damages are awarded). Moreover, using the same evidence and expert witnesses, the trial lawyers can bring essentially the same case over and over again, with new plaintiffs, to generate additional income in the form of contingency fees.¹⁶⁷

\$100,000 per year. As a result, three of the six obstetricians in Cleveland will no longer deliver babies. Yazoo City, with a population of 14,550 residents, does not have a single obstetrician).

164. McDowell, *supra* note 141, at 297.

165. Nagareda, *supra* note 154, at 1166. Professor Nagareda notes that the term "entrepreneurial litigation" originated in scholarship focused primarily upon corporate and securities class actions. *Id.* (citing John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987)). Commentators have extended the analysis to the mass tort context. *See, e.g.,* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1347, 1373-76 (1995).

166. *See* Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899, 909-10 (1996).

167. *See id.* at 910.

This practice became famous (or infamous) in the tobacco litigation,¹⁶⁸ extending to the pooling of financial resources by prominent and well-capitalized plaintiffs' law firms.¹⁶⁹ Even mainstream newspapers have noticed the pervasive involvement by the same group of private lawyers in Medicaid reimbursement actions ostensibly brought by state governments¹⁷⁰ and the financial benefit those attorneys stand to gain.¹⁷¹

168. The tobacco litigation is only one example of the tension between respect for individual choice and respect for what Richard Klein has labeled "healthism," that is, a societal demand that people make choices to benefit, rather than harm, their own health. Nagareda, *supra* note 154, at 1188 (citing RICHARD KLEIN, CIGARETTES ARE SUBLIME 191 (1993)). The respect for individual choice extends beyond the demand of the plaintiffs' bar for information and warning labels to allow people the greatest possible information as they make their risk decisions. It is also present in the recognition of a constitutional right of privacy. *See, e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (abortion); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraception). *See generally* *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261 (1990) (assuming that competent persons have a constitutional right to refuse life-extending treatment). In both contexts, the law has sought to facilitate significant individual choices free from coercion, even when those choices may be considered socially destructive or contrary to the person's best interests. Nagareda, *supra* note 154, at 1188.

In Klein's view, "[h]ealthism has become part of the dominant ideology of America," an ideology that "has sought to make longevity the principal measure of a good life." *Id.* (quoting KLEIN, *supra*, at 185, 191). This use of the courts to define for others what makes life worth living, renders recent developments in the tobacco litigation disturbing, and even threatening, to some. *Id.* In fact, the Medicaid reimbursement suits brought by state attorneys general are based on an argument that smokers' implicit rejection of healthism costs the rest of society (via tax-supported medical care). W. Kip Viscusi argues, however, that while smokers do incur higher medical costs, their shorter life expectancy means that smokers incur a cost of \$0.11 per pack less in nursing home costs and nine cents per pack less in pension costs. On balance, smokers incur about \$0.14 less per pack in costs paid by Massachusetts, while contributing an additional \$0.51 per pack in excise taxes. W. Kip Viscusi, *Smoked Out* (a synopsis of W. Kip Viscusi, SMOKE-FILLED ROOMS: A POSTMORTEM ON THE TOBACCO DEAL (2002), at <http://www.press.uchicago.edu/Misc/Chicago/857476.html> (last visited June 14, 2002)).

169. *See* Nagareda, *supra* note 154, at 1166-67 (citing Glenn Collins, *A Tobacco Case's Legal Buccaneers*, N.Y. TIMES, Mar. 6, 1995, at C1 (reporting at the outset of the most recent wave of tobacco litigation that "[c]lose to 60 prominent law firms known for so-called toxic torts are contributing \$100,000 each to a consortium, filling an annual war chest of nearly \$6 million")). *Cf. In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 216, 218 (2d Cir. 1987) (discussing an early example of resource pooling by plaintiffs' counsel in the Agent Orange litigation).

170. Nagareda, *supra* note 154, at 1167 (citing Barry Meier, *In Tobacco Talks; Lawyers Hold Key*, N.Y. TIMES, May 22, 1997, at A1).

171. *Id.* (citing Paul A. Gigot, *\$50 Million Men: Tobacco Lawyers Become Sultans*, WALL ST. J., June 27, 1997, at A14; Barry Meier, *Record Legal Fees Emerge as Issue in Tobacco Deal*, N.Y. TIMES, June 23, 1997, at A11; Richard B. Schmitt, *Big Winners in the Settlement Could Be the Lawyers*, WALL ST. J., June 23, 1997, at B1; Matthew Scully, *A Modest Proposal on Tobacco Lawyers Fees*, WALL ST. J., July 9, 1997, at A14).

Mass tort litigation, therefore, serves as a long-term investment in the future of the plaintiffs' bar itself. However, the ultimate fees the plaintiffs' bar hopes will be generated from the litigation depends in large part on expectations about how juries will view the cases. Of course, like all other tort cases, few mass tort claims ultimately yield jury verdicts.¹⁷² But litigants' perceptions (whether accurate or not), as to what a jury would do in a given kind of litigation impact both the initial decision to sue and, later, settlement negotiations.¹⁷³ As the silicon breast implant litigation demonstrates, moreover, verdicts in a few early individual lawsuits can exercise considerable influence upon the subsequent course of events.¹⁷⁴

Congress has enacted few laws to counteract the tort litigation explosion.¹⁷⁵

172. See Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1212-13 (1992) (statistics related to number of tort cases that go to trial, are settled, or otherwise resolved).

173. See Nagareda, *supra* note 154, at 1167. The Texas Supreme Court in *Able Supply Company v. Moye*, 898 S.W.2d 766, 771-72 (Tex. 1995), decried a trial judge's rulings that essentially rendered the defendant companies hostage to 3000 plaintiffs who alleged all types of injury purportedly related to exposure to multiple chemicals over a forty-year span. The judge noted that "[t]he defendants have been parties to this suit for eight years without access to the basic facts underpinning the claims against them. Defense costs have mounted to millions of dollars over the past two years alone." *Id.* at 771. Moreover, the court rejected the plaintiffs' extortionate offer to release defendants who provide them with satisfactory evidence of their nonliability.

This offer is no substitute for meaningful discovery. In the first place, it unacceptably places plaintiffs in the position of the sole fact finder and judge of the defendants' evidence. In the second place, it misconstrues plaintiffs' obligations under the Texas Rules of Civil Procedure. Plaintiffs have an affirmative obligation under Rule 13 to sign pleadings that to the best of plaintiffs' knowledge, information and belief, formed after reasonable inquiry, assert claims that are not groundless and brought in bad faith or groundless and brought for purpose of harassment. TEX. R. CIV. P. 13. Plaintiffs *also* have an obligation to comply with the rules requiring them to answer interrogatories and engage in other discovery. Finally, the offer of voluntary dismissal of "non-liable defendants" is little solace to the defendants who have already participated in eight years of discovery, who are not dismissed by the plaintiffs, and who face continued proceedings with little prospect of a prompt resolution on the merits.

Id. at 772.

174. See *supra* notes 80-87 and accompanying text.

175. Former Senator Spencer Abraham of Michigan made the case for national, as opposed to state, tort reform as follows:

[P]roduct liability, in which rulings and their costs create not a series of competitive state markets, but rather a restrictive, illogical, and inefficient national market. Moreover, we effectively already have a single unitary tort system in the law of products liability. Unfortunately, our unitary system comprises not a coherent, consistent body of laws, but the most commercially restrictive features of the tort laws of individual states.

In three narrow areas in which Congress has specifically addressed the prospect of tort litigation driving valuable products off the market, the results have been dramatic. The first example relates to vaccines. "By 1986, many manufacturers of childhood vaccines had fled the American market and the country had less than six months of vaccine stores left."¹⁷⁶ Congress feared that the prospect of tort liability for vaccine-related injuries would drive up prices so high that vaccine suppliers would be forced out of the market.¹⁷⁷ Alternatively, Congress also worried that given the uncertain nature of litigation, some deserving victims of vaccine-related injuries might not be fully compensated.¹⁷⁸ Therefore, Congress passed the National Vaccine Injury Compensation Program,¹⁷⁹ that provided a specified recourse for families to pursue injury claims while discouraging further private mass tort litigation against the pharmaceutical companies.¹⁸⁰ "Among other things, the Act established a special tribunal (the

It is not difficult to see how this has come about: The law of the state in which the alleged harm occurs generally decides tort cases. Yet our market for products is national, so every company must be prepared to be sued in any state in which its product might be used. If a car built and sold in Michigan by a Michigan corporation is in an accident on a California freeway, California's tort law will determine whether the car maker is liable. If the California legislature decides that side air bags are a necessary safety feature, it could impose strict liability on the manufacturer of any car made anywhere in the United States without one. . . .

Under these circumstances, how can states serve as "laboratories of democracy" in the area of product liability? No state will know or have any real incentive to find out whether its product-liability "experiment" has succeeded or failed. Why? Because liability costs—in the form of higher prices for goods and services—are spread nationwide. Meanwhile, the benefits of the state's product-liability system flow primarily to its residents, who constitute the vast majority of potential plaintiffs. A state that elects a less costly set of product-liability rules will see the benefits of that system shared by in- and out-of-staters alike, while its residents will continue to pay almost as much for products because of more costly out-of-state tort systems. Congress does not face the same obstacles in enacting product-liability legislation. It, and it alone, can develop a set of national rules designed to maximize the common good whose costs and benefits will be shared by all citizens.

Spencer Abraham, *Litigation Tariff: The Federalist Case for National Tort Reform*, 73 POL'Y REV. 77 (Summer 1995).

176. Arkin, *supra* note 161.

177. See H.R. REP. NO. 99-908, 1, 4, 6-7 (1986), reprinted in 1986 U.S.C.C.A.N. 6287, 6344, 6345, 6347-48.

178. See *id.*

179. Pub. L. No. 99-660, § 311(a), 100 Stat. 3755 (codified at 42 U.S.C. §§ 300aa-11 (2001)).

180. Arkin, *supra* note 161. The "swine flu epidemic of 1976" provides another example. After four people contracted a new strain of influenza dubbed "swine flu," the "pharmaceutical companies quickly developed a vaccine." See Wilson, *supra* note 18 (citing HUBER, *supra* note 17, at 133-34). Because insurers, fearing undue exposure to liability, refused to underwrite the new

Vaccine Court), and moved vaccine-injury cases partly outside the customary tort framework."¹⁸¹ Congress also eased the complainants' burdens in Vaccine Court by dispensing with the requirement of proving negligence and by greatly simplifying the requisite proof of causation.¹⁸² In return, Congress limited the damages that a victim could obtain for vaccine-related injuries.¹⁸³ Four years later, private pharmaceutical companies were back in business, researching and developing childhood vaccines.¹⁸⁴

In the 1990s, the response by the pharmaceutical companies was even more dramatic. More people received immunizations and wholesale prices of vaccines decreased.¹⁸⁵ Moreover, since 1990, the pharmaceutical companies have not ceased production of a single vaccine in the United States.¹⁸⁶ Even better, the pharmaceutical industry has been re-energized to invest in research and development of new vaccines,¹⁸⁷ including those for diseases for which no vaccines had previously existed, those combining immunizations for multiple diseases, and those improving on existing vaccines.¹⁸⁸

vaccine, *id.*, Congress passed a law providing that a person who developed a malady as a result of having been vaccinated under the National Swine Influenza Immunization Program of 1976 (Swine Flu Act), 42 U.S.C. § 247(b) (j)(1) (2000), may recover just compensation from the United States without proving the government's fault or negligence. See 28 U.S.C. §§ 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680 (1982) (amending Federal Tort Claims Act for swine flu claims); *In re Swine Flu Immunization Prods. Liab. Litig.*, 508 F. Supp 897 (D. Colo.), *aff'd* 708 F.2d 502 (10th Cir. 1981); *Sparks v. Wyeth Labs., Inc.*, 431 F. Supp. 411 (W.D. Okla. 1977) (upholding constitutionality of program). Approximately 4000 administrative claims were filed, resulting in more than 1500 suits in federal district courts. Arnold W. Reitze, Jr., *Federal Compensation for Vaccination Induced Injuries*, 13 B.C. ENVTL. AFF. L. REV. 169, 181 (1986) (citing Rheingold & Shoemaker, *The Swine Flu Litigation*, 8 LITIG. 28 (Fall 1982)). Compare Kellen F. Cloney, Note, *AIDS Vaccine Manufacturers v. Tort Regime: The Need for Alternatives*, 49 WASH. & LEE L. REV. 559, 570 (1992) (stating that pharmaceutical company said that if it produced an AIDS vaccine, Congress would have to provide a safe harbor for liability before the company would be willing to market it).

181. *O'Connell v. Shalala*, 79 F.3d 170, 173 (1st Cir. 1996).

182. See National Vaccine Injury Compensation Program, 42 U.S.C. §§ 300aa-11 (2000).

183. See *id.* § 300aa-15.

184. Arkin, *supra* note 161.

185. See Elizabeth C. Scott, *The National Childhood Vaccine Injury Act Turns Fifteen*, 56 FOOD DRUG L.J. 351, 357 (2001) (citing Derry Ridgway, *No-Fault Vaccine Insurance: Lessons From the National Vaccine Injury Compensation Program*, 24 J. HEALTH POL. POL'Y L. 59, 76 (1999)).

186. *Id.*

187. See generally Nat'l Inst. of Allergy and Infectious Diseases, *The Jordan Report 2000: Accelerated Development of Vaccines*, at <http://www.niaid.nih.gov/newsroom/releases/jordan00.html> (last visited Feb. 28, 2003) (detailing progress on vaccines for malaria, AIDS, tuberculosis, hepatitis, anthrax and more than fifty other diseases; the report also discusses new technologies for administering vaccines, such as through patches on the skin rather than needles).

188. See Scott, *supra* note 185, at 357.

Congress also responded to manufacturers' decisions to leave the biomedical supply market by enacting legislation entitled the "Biomaterials Access Assurance Act of 1998" (BAAA).¹⁸⁹ BAAA applies to all implant raw materials and components except the silicone gel and the silicone envelope utilized in a breast implant containing silicone gel.¹⁹⁰ The law supersedes otherwise applicable state laws and procedures by precluding any civil action, regardless of the legal theory upon which it is based, for harm, other than commercial loss or loss of or damage to an implant, caused by an implant.¹⁹¹ The BAAA also provides expedited dismissal procedures for unwarranted suits against biomaterials suppliers.¹⁹²

The full impact of the BAAA on the medical device market is still unknown, but early signs are promising. If the medical device market has potential prospective value, some companies may enter or remain in the market because BAAA serves as a product liability safety net. "For example, Vitrex USA, Inc. will enter the medical implant market 'because the legislation gives it additional liability protection.' Whereas, Thermedics, Inc. stayed in the medical device market all along."¹⁹³ "Some major medical device raw material suppliers that left the market due to concerns over product liability" (e.g., DuPont and Dow Chemical Co.), however, await a court ruling on the BAAA before reentering the market.¹⁹⁴ Due to its very nature, biotechnology already labors under a cloud of controversy such that any verdict of liability can cause disproportionate harm to the industry.¹⁹⁵ However, it seems likely that Congress' intent to protect

189. The Biomaterials Access Assurance Act of 1998, Pub. L. No. 105-230, § 1, 112 Stat. 1519 (codified at 21 U.S.C. §§ 1601-1606 (2000)).

190. 21 U.S.C. § 1602(2)(D)(iii) (2000).

191. *Id.* §§ 1603(b)(2)(c).

192. *Id.* §§ 1605-1606.

193. Anne Marie Murphy, Note, *The Biomaterials Access Assurance Act of 1998 and Supplier Liability: Who You Gonna Sue?*, 25 DEL. J. CORP. L. 715, 738 (2000) (citing Steven Toloken, *Doubt Shrouds Biomaterials Assurance Act: Resin Makers Take Wait-and-See Stance with Liability Protection Law*, PLASTICS NEWS, May 31, 1999)).

194. *Id.*

195. For example, genetically modified (GM) crops have been banned in Europe since April 1998. In trade talks, the European Union is also pushing for strict controls over the importation of GM foods. BBC News, *EU to Fight for GM Food Ban* (Dec. 13, 1999), at http://news.bbc.co.uk/hi/english/business/newsid_563000/563579.stm (last visited Oct. 4, 2001). The controversy has not exempted the United States. Opposition to agricultural genetic engineering was a major theme for many American protesters at the World Trade Organization meeting in Seattle and International Monetary Fund/World Bank meetings in Washington, D.C. Jen Soriano, *Hot Button Issue: Genetically Modified Foods*, MOTHER JONES (Nov. 24, 1999), at <http://www.mojones.com/wto/soriano2.html> (last visited Oct. 4, 2001). Biotechnology opponent Jeremy Rifkin initiated a class-action lawsuit against Monsanto and other companies for bringing genetically modified seeds to the market. The Foundation on Economic Trends, *Landmark Class-Action Anti-Trust Lawsuit Filed Against Monsanto* (Dec. 14, 1999), at <http://www.biotechcentury.org/> (last visited Oct. 4, 2001). Anti-biotech demonstrators dominated a recent FDA public hearing on GM foods in

biomaterials suppliers from “excessive litigation expenses to guarantee the future supply of lifesaving and life-enhancing medical devices” will, in time, be borne out.¹⁹⁶

The third example relates to statutes of repose for aircraft. Statutes of repose reflect the public policy that, after the passage of a reasonable length of time, manufacturers should be free from the burdens of disruptive litigation over products that are alleged to cause harm after many years of safe operation and use.¹⁹⁷ Almost half of the states have enacted statutes of repose of varying lengths. On the federal level, in 1994, the General Aviation Revitalization Act (GARA) was signed into law to breathe life into an industry that had experienced a ninety-five percent decline in production and a loss of 100,000 jobs in the preceding two decades.¹⁹⁸ Among other things, the legislation limited lawsuits on planes more than eighteen years old.¹⁹⁹ The purpose of GARA is to

establish a Federal statute of repose to protect general aviation manufacturers from long-term liability in those instances where a particular aircraft has been in operation for a considerable number of years. A statute of repose is a legal recognition that, after an extended period of time, a product has demonstrated its safety and quality, and that it is not reasonable to hold a manufacturer legally responsible for an accident or injury occurring after that much time has elapsed.²⁰⁰

Five years later, the General Aviation Manufacturers Association issued a report on the Act declaring it “an unqualified success.”²⁰¹ According to the report, general aviation production lines created 25,000 new manufacturing jobs as well as thousands of additional jobs in support industries. Production of general aviation aircraft in the United States more than doubled from 1994 to

Oakland. The agency has a “new initiative to engage the public about foods made using bioengineering.” HHS News, *FDA Announces Public Meetings on Bioengineered Foods* (Oct. 18, 1999), available at <http://www.fda.gov/bbs/topics/NEWS/NEW00695.html> (last visited Oct. 4, 2001).

196. See generally Kerouac, *supra* note 51, at 331 (arguing that the BAAA furthers both corrective justice policies underlying tort law as well as economic efficiency).

197. See Charles E. Cantu, *The Recycling, Dismantling, and Destruction of Goods as a Foreseeable Use Under Section 402A of the Restatement (Second) of Torts*, 46 ALA. L. REV. 81, 99 n.111 (1994).

198. See Ladd Sanger, *Will the General Aviation Revitalization Act of 1994 Allow the Industry to Fly High Once Again?*, 20 OKLA. CITY U.L. REV. 435, 436 (1995).

199. General Aviation Revitalization Act of 1994, Pub. L. No. 103-298, § 2(a), 108 Stat. 1552 (codified at 49 U.S.C. § 40101 (2000)).

200. 140 CONG. REC. at H4998, H4999 (daily ed. July 27, 1994) (statement of Rep. Hamilton Fish R-NY), quoted in *Altseimer v. Bell Helicopter Textron Inc.*, 919 F. Supp. 340, 342 (E.D. Cal. 1996).

201. *General Aviation Manufacturers Association: A Report to the President and Congress on the General Aviation Revitalization Act*, available at <http://www.generalaviation.org/pdfs/garaweb.pdf> (last visited June 22, 2001).

1999. Exports also doubled. Moreover, in the five years after GARA was enacted, investment in research and development by general aviation companies grew by more than 150%.²⁰² This one narrow tort reform measure had very positive results, and a strong ripple effect in communities across the country. For example, Cessna located a new small aircraft plant in Montgomery County, Kansas, that revived the local economy.

[P]rior to 1995, Montgomery County ranked ninety-eighth out of 105 Kansas counties in economic indicators. Its population was dropping, employment was on the decline, per capita income was down, and property values were depressed. Economic growth since the construction of the plant began has exceeded all predictions made in a study the county prepared in 1995. New housing starts are up 260 percent, the value of new homes has doubled, retail sales are up five percent, per capita income has nearly doubled, and nearly 500 people per year are moving into the county.²⁰³

Reform has been more common at the state level, although the courts sometimes seem to exhibit an almost visceral dislike for such measures.²⁰⁴ In California, widespread dissatisfaction with joint and several liability, the “deep pocket” rule, resulted in the overwhelming passage of Proposition 51, the Fair Responsibility Act of 1986, by a 62% affirmative vote.²⁰⁵ Proposition 51 abolished the principle of joint and several liability for nonpecuniary damages by requiring a defendant to pay only his or her proportionate share of noneconomic damages, but still allowed joint and several liability for all economic damages.²⁰⁶ Joint and several liability for noneconomic damages threatened bankruptcies of local governments, other public agencies, private individuals, and businesses; resulted in higher prices and taxes; caused curtailment of essential police, fire, and other protections; and promised to wreak catastrophic economic consequences all because deep pocket defendants were held financially liable for all of the damages found, even if that defendant shared in only a fraction of the fault.²⁰⁷ The people announced that “to remedy these

202. *Id.*

203. S. REP. NO. 105-32 at 123122 (1997) (testimony of John Peterson of the Montgomery County Action Council of Coffeyville, Kansas).

204. *See State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1072-73, for particularly vituperative swipes at the Legislature that *dared* to enact tort reform; *see also* Mark Thompson, *Letting the Air out of Tort Reform: After Making Inroads in State Legislatures, Proponents of Restrictions on Tortsuits New Are Fighting in the Courts to Protect Their Gains*, 83 A.B.A. J. 64, 65 (1997) (“Through the end of 1996, high courts in 24 states had handed down 61 different decisions overturning all or parts of laws that attempted to limit damages or erect other hurdles to discourage tort suits . . .”).

205. Cathie Calvert, *Prop. 51 is Only a Step in Ending State Liability Crisis*, SAN JOSE MERCURY NEWS at 1A (June 4, 1986).

206. CAL. CIV. CODE § 1431.1-1431.5 (2002).

207. *See id.* § 1431.1(a)-(b) (findings and declaration of purpose of Proposition 51).

inequities, defendants in tort actions shall be held financially liable in closer proportion to their degree of fault. To treat them differently is unfair and inequitable.”²⁰⁸

Even after Proposition 51, multiple defendants still bear joint and several liability for provable medical costs and other tangible amounts. However, each defendant is liable solely in proportion to its assessed degree of fault for noneconomic damages, including pain, suffering, or emotional distress.²⁰⁹ Proposition 51 thus allows an injured plaintiff to recover the full amount of economic damages suffered, regardless of which defendants are named. The defendants are left to sort out payment in proportion to fault amongst themselves, and they must bear the risk of nonrecovery from impecunious defendants. However, as to noneconomic damages, the plaintiff must sue all the defendants to enable a full recovery.²¹⁰ “Failure to name a defendant will preclude recovery of that defendant’s proportional share of damages, and the plaintiff will bear the risk of nonrecovery from an impecunious tortfeasor.”²¹¹

In 1999, Florida enacted a tort reform law, much more wide-ranging than California’s Proposition 51, to address many of the most common abuses in tort litigation, especially in the context of product liability litigation.²¹² In a particularly notorious case arising from an accident at Walt DisneyWorld in Orlando, Disney was required to pay an entire damages award, even though it was found to be only 1% at fault for the plaintiff’s harm.²¹³ In response, Florida’s tort reform law places restrictions on joint and several liability. Under the new law, a defendant found less than 10% at fault in lawsuits involving multiple defendants is not jointly and severally liable; a defendant found 11% to 25% liable is jointly and severally liable only for economic damages, and then for an amount not exceeding \$200,000, and so on.²¹⁴ The new law also includes

208. *Id.* § 1431.1(c).

209. *Id.* § 1431.2.

210. *Evangelatos v. Super. Ct.*, 753 P.2d 585, 594-95 (Cal. 1988).

211. *Aetna Health Plans of Cal., Inc. v. Yucaipa-Calimesa Joint Unified Sch. Dist.*, 85 Cal. Rptr.2d 672, 681 (Cal. Ct. App. 1999).

212. Act of Oct. 1, 1999, ch. 99-225, 1999 Fla. Laws 1400 (codified at FLA. STAT. § 768.81 (1999)). Provisions include requiring mediation in certain types of actions and creating trial-resolution judges; amending statutes relating to evidence of remedial measures; creating a limitation of liability if security measures are undertaken by convenience-store owners; restricting the liability of possessors of land to trespassers; placing caps on punitive damages; apportioning damages under comparative fault; and imposing sanctions for unsupported claims or defenses.

213. *Walt Disney World Co. v. Wood*, 515 So. 2d 198 (Fla. 1987).

214. These restrictions were not the Florida legislature’s first foray into tort reform. In 1986, the legislature eliminated joint and several liability for noneconomic damages in cases where the total damage award exceeds \$25,000. FLA. STAT. § 768.81(3) (1987); *Y.H. Investments, Inc., v. Godales*, 690 So. 2d 1273, 1277 (Fla. 1997) (“[U]nder section 768.81, a tort-feasor who is determined to have been only ten percent at fault in causing an injury will only be liable for ten percent of the damages. That is a simple and rather straightforward proposition and represents a legislative policy choice to apportion liability for damages based upon a party’s fault in causing the

a statute of repose, precluding plaintiffs from suing over the failure of worn out products when they reach a certain age (twelve or twenty years, depending on the product).²¹⁵ In addition, Florida's tort reform law prescribes reasonable caps on the award of punitive damages.²¹⁶ There are many other provisions,²¹⁷ but the common thread is that Florida's tort reform law stems the litigation abuse that places an unwarranted burden on the state's economy, to the detriment of the millions of consumers and citizens who benefit from its many products and services.²¹⁸

Tort reform measures are generally designed to make more uniform and predictable the way in which the legal system will work;²¹⁹ to make it more just;²²⁰ to reduce the cost of litigation and the overall transaction costs;²²¹ to

damage.”).

215. See ch. 99-225, §§ 11, 12, 1999 Fla. Laws 1400, 1410 (amending FLA. STAT. § 95.031 (1997)).

216. The extensive problems associated with punitive damages are beyond the scope of this Article. The general theme of criticism of punitive damages focuses on uncertainty. There is no sure way of determining whether punitive damages will be awarded in a particular case, nor is there any way to guess the amount of punitive damages if they are awarded. Consequently, businesses often end up settling questionable lawsuits just to avoid unpredictable punitive damage awards that are frequently based more on emotion and sympathy than a belief in a defendant's malicious wrongdoing.

217. For a detailed explanation of all the provisions of the law, see generally George N. Meros, Jr. & Chanta G. Hundley, *Florida's Tort Reform Act: Keeping Faith with the Promise of Hoffman v. Jones*, 27 FLA. ST. U. L. REV. 461 (2000).

218. Trial lawyers, unions, and a variety of special interest groups sued to overturn Chapter 99-225 shortly after it was signed into law. The trial court held that the law violated the single-subject rule and struck it down. However, Florida's First District Court of Appeal reversed this decision, holding that the case was not justiciable because the plaintiffs' claims were nothing more than “speculation” and “hypothesis.” *State of Florida v. Florida Consumer Action Network*, 830 So. 2d 148, 153 (Fla. Dist. Ct. App. 2002).

219. See *Quest Medical, Inc. v. Apprill*, 90 F.3d 1080, 1093 (5th Cir. 1996) (noting that the Texas legislature enacted tort reform measures to restore and maintain “reasonable predictability in the Texas system”); N.J. STAT. ANN. § 2A:58C-1(a) (2002) (“The Legislature finds that there is an urgent need for remedial legislation to establish clear rules with respect to certain matters relating to actions for damages for harm caused by products, including certain principles under which liability is imposed and the standards and procedures for the award of punitive damages.”); *Edinburg Hosp. Auth. v. Trevino*, 941 S.W.2d 76, 84 (Tex. 1997) (creating “certainty” is a purpose of tort reform).

220. See Kimberly A. Pace, *Recalibrating the Scales of Justice Through National Punitive Damage Reform*, 46 AM. U. L. REV. 1573, 1616 (1997) (“[T]he integrity of the judicial system is threatened when there is unpredictability in the law and its application. Instability in the law and its application breeds discontent and disrespect for the law which, in turn, erodes public confidence in the legal process.”).

221. See *McConkey v. Hart*, 930 P.2d 402, 408 (Alaska 1996) (stating that the purposes of Alaska tort reform law included “to create a more equitable distribution of the cost and risk of

restore the competitiveness of American industry;²²² to provide additional incentives for research;²²³ and to develop and offer for sale in the market new and better medical devices, mechanical products and sporting goods that Americans have come to expect. Moreover, tort reform benefits the small businesses that comprise the vast majority of all business in this country. Small businesses run greater risks of being put out of business quickly.²²⁴ Notwithstanding the economic pressures borne every day by small business, they represent the overwhelming dynamic center of the American economy.²²⁵

injury and increase the availability and affordability of insurance.”) (citing SENATE FINDINGS AND PURPOSE, S. 14-377, 2d Sess. (Alaska 1986)); *Corbetta v. Albertson's, Inc.*, 975 P.2d 718, 722 (Colo. 1999) (explaining that the purpose of tort reform is to limit plaintiffs' recovery, especially with regard to punitive damages); *Moody v. Dykes*, 496 S.E.2d 907, 912 (Ga. 1998) (stating that the purpose of tort reform is to bring litigation to an “expeditious but reasonable conclusion).

222. See e.g., S. REP. NO. 104-69, at 2 (1995) (explaining that American companies are hampered by a liability system when competing in global market); Dan Quayle, *Civil Justice Reform*, 41 AM. U. L. REV. 559, 559-61 (1992) (discussing President's Council on Competitiveness' recommendations for civil justice reform); see generally Priest, *supra* note 5.

223. See e.g., *Brewer v. Fibreboard Corp.*, 901 P.2d 297, 302 (Wash. 1995) (quoting preamble to WASH. REV. CODE § 7.72 (2002) (“Sharply rising premiums for product liability insurance have increased the cost of consumer and industrial goods. These increases in premiums have resulted in disincentives to industrial innovation and the development of new products.”)).

224. See Brooks M. Beard, *The New Environmental Federalism: Can the EPA's Voluntary Audit Policy Survive?*, 17 VA. ENVTL. L.J. 1, 22 (1997) (“For the most part, small businesses' goals are consistent with those of large industry. Similarly concerned with liability risks and penalty costs, small businesses must contend with the real possibility of being put out of business as a result of financial penalties imposed by the EPA or private lawsuit damages.”).

225. According to the United States Department of State, small businesses represent the backbone of the American economy:

Fully 99 percent of all independent enterprises in the country employ fewer than 500 people. These small enterprises account for 52 percent of all U.S. workers, according to the U.S. Small Business Administration (SBA). Some 19.6 million Americans work for companies employing fewer than 20 workers, 18.4 million work for firms employing between 20 and 99 workers, and 14.6 million work for firms with 100 to 499 workers. By contrast, 47.7 million Americans work for firms with 500 or more employees.

Small businesses are a continuing source of dynamism for the American economy. They produced three-fourths of the economy's new jobs between 1990 and 1995, an even larger contribution to employment growth than they made in the 1980s. They also represent an entry point into the economy for new groups. Women, for instance, participate heavily in small businesses. The number of female-owned businesses climbed by 89 percent, to an estimated 8.1 million, between 1987 and 1997, and women-owned sole proprietorships were expected to reach 35 percent of all such ventures by the year 2000. Small firms also tend to hire a greater number of older workers and people who prefer to work part-time.

CONCLUSION

The present system in the United States for resolving product liability disputes and compensating those injured by defective products is costly, slow, inequitable, and unpredictable. Such a system does not benefit manufacturers, product sellers, or injured persons. The system's high transaction costs exceed compensation paid to victims. Those transaction costs are passed on to consumers through higher product prices. The system's unpredictability and inefficiency have stifled innovation, kept beneficial products off the market, and have handicapped American firms as they compete in the global economy.²²⁶

Tort reform efforts seek to reduce transaction costs, provide greater certainty as to the rights and responsibilities of all parties involved in product liability disputes, encourage innovation, increase the competitiveness of American firms, reduce burdens on interstate commerce, and safeguard due process rights. The words of former Justice Benjamin Cardozo are instructive: the law is "guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of [legal] problems."²²⁷

For most of its 250 years, America's hallmark has been the vibrant entrepreneurial spirit and energy of its people. Indeed, American free enterprise has facilitated the success stories of millions of individuals and businesses, which have in turn driven the most productive, progressive and responsive economy in the history of the world. But there is mounting concern that over the course of the past three decades that traditional entrepreneurial spirit and energy has contracted a weakening condition, not unlike the symptoms of a parasitic illness. Unless this condition is recognized and addressed, it will eventually succeed in sapping that entrepreneurial spirit and energy so vital to free enterprise.

OF THE U.S. ECONOMY, available at <http://usinfo.state.gov/products/pubs/oecon/chap4.htm> (last visited Oct. 10, 2002).

226. Victor E. Schwartz & Mark A. Behrens, *Federal Product Liability Reform Legislation Is Consistent with Virginia Law and Should Be Strongly Supported*, 4 GEO. MASON L. REV. 279, 280 (1996).

227. *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937), cited in Rachel J. Littman, *Adequate Provocation, Individual Responsibility, and the Deconstruction of Free Will*, 60 ALB. L. REV. 1127, 1169 (1997).

EVIDENTIARY ISSUES IN FEDERAL PROSECUTIONS OF VIOLENCE AGAINST WOMEN

TOM LININGER*

In the last decade, the federal government has played an increasing role in the prosecution of violence against women.¹ Beginning with the passage of the Violence Against Women Act ("VAWA") in 1994,² Congress has established several new federal offenses involving violence against women.³ The number of charges filed under these statutes has steadily increased.⁴ The United States

* Assistant Professor, University of Oregon School of Law. B.A., 1988, Yale University; J.D., 1991, Harvard Law School. As a federal prosecutor, the author obtained the first conviction in the nation under a 1996 provision of the Violence Against Women Act, 18 U.S.C. § 922(g)(9). Bonnie Campbell, the Director of the U.S. Department of Justice's Violence Against Women Office during the Clinton Administration, has given the author a commendation as "a national leader in the prosecution of domestic violence." The author thanks the following students who helped with the research for this article: James Avery, Ray Cornwell, Shawn Dickey, Ivan Gardzelewski, Brian Haaland, Michael Harris, Ricardo Juarez, Michael McClaren, Andy Moore, and Derek Reiman. The author is also grateful for data compilations obtained from Margaret Groban of the Office on Violence Against Women at the U.S. Department of Justice.

1. A number of scholars have discussed the "federalization" of domestic violence law and other areas of the law that were historically the exclusive domain of the states. *See, e.g.*, William G. Bassler, *The Federalization of Domestic Violence: An Exercise in Cooperative Federalism or a Misallocation of Federal Judicial Resources?*, 48 RUTGERS L. REV. 1139, 1142 (concluding that, "by federalizing an area of law that state courts are more capable of adjudicating, Congress has seriously misallocated federal judicial resources"); Michelle W. Easterling, *For Better or Worse: The Federalization of Domestic Violence*, 98 W. VA. L. REV. 933, 950-53 (1996) (advocating the elimination of criminal offenses under VAWA); David M. Fine, *The Violence Against Women Act of 1994: The Proper Federal Role In Policing Domestic Violence*, 84 CORNELL L. REV. 252, 301 (1998) (applauding VAWA as "an appropriate congressional response to a national problem"); William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1227 (2002) (noting that in Congress, "Democrats seek to federalize domestic violence law"); Pamela A. Paotopoulos, *Violence Against Women Act: Federal Relief for State Prosecutors*, 30 PROSECUTOR 20, 30 (May/June 1996) (suggesting that the passage of VAWA is a salutary development because states have limited resources to investigate and prosecute domestic violence offenses).

2. Pub. L. No. 103-322 (codified as amended in various sections of 8, 16, 18, 20, 28, and 42 U.S.C.). VAWA included a civil remedy that was struck down by the U.S. Supreme Court in *United States v. Morrison*, 529 U.S. 598 (2000). The majority opinion noted in a footnote that the criminal provisions of VAWA relating to interstate domestic violence were not unconstitutional because they implicated the Commerce Power. *Id.* at 613 n.5.

3. These include criminal provisions pertaining to interstate domestic violence (18 U.S.C. § 2261), interstate violation of protective orders (18 U.S.C. § 2262), interstate stalking (18 U.S.C. § 2261A), possession of a firearm by a person against whom a restraining order is pending (18 U.S.C. § 922(g)(8)), and possession of a firearm by a person convicted of a misdemeanor crime of domestic violence (18 U.S.C. § 922(g)(9)). All of these statutes took effect in 1995, except for 18 U.S.C. § 922(g)(9), which took effect in 1996.

4. According to statistics maintained by the Executive Office of United States Attorneys

Department of Justice has also intensified its commitment to prosecuting violence against women in Indian country, where the United States has jurisdiction over certain major crimes such as rape and sexual assault.⁵ In 1995,

(EOUSA), the number of cases filed under 18 U.S.C. §§ 922(g)(8), 922(g)(9), 2261, 2261A, and 2262 have climbed in almost every year since the enactment of VAWA in 1994. In 1995, three cases were filed under these provisions. In 1996, eighteen cases were filed. In 1997, fifty-two cases were filed. In 1998, fifty-eight cases were filed. In 1999, 152 cases were filed. In 2000, 234 cases were filed. In 2001, 208 cases were filed. In 2002 (based on extrapolation of statistics compiled through June 2002), 276 cases were filed. The average annual increase in case filings was 134% during this period. It appears that most of the VAWA prosecutions have involved firearms charges under 18 U.S.C. §§ 922(g)(8), 922(g)(9). For example, under 18 U.S.C. § 922(g)(8) (the gun ban while a restraining order is pending) federal prosecutors filed three cases in 1996, thirteen in 1997, twelve in 1998, thirty-six in 1999, fifty-five in 2000, and sixty-eight in 2001, the last year for which complete data are available. Under 18 U.S.C. § 922(g)(9) (the gun ban for convicted domestic abusers) federal prosecutors filed one case in 1996, ten in 1997, sixteen in 1998, sixty-eight in 1999, 159 in 2000, and 125 in 2001. The foregoing figures were provided to this author in a series of reports faxed from EOUSA in July 2002 and January 2003 (on file with the author). The statistics in these reports were derived from data submitted regularly to EOUSA by the ninety-four United States Attorneys' Offices. The reports included all cases in which the above-listed statutes were charged, even if these statutes were not the lead charges. It is important to note that prior to 1999, the United States Attorneys' case management system did not include complete statutory citations, so the figures in the reports may underestimate the number of cases brought prior to 1999.

5. This jurisdiction arises under the Major Crimes Act, 18 U.S.C. § 1153. Tracy A. Henke, Principal Deputy Assistant Attorney General at the Office of Justice Programs in the U.S. Department of Justice, testified before the Senate Indian Affairs Committee on March 5, 2002, that the U.S. Department of Justice will strive to ensure "no domestic violence and sexual assault victims fall through the cracks" on Indian reservations. Her written testimony is available on the internet at <http://www.usdoj.gov/otj/statementtracy/03-05-2002.htm>. According to the Bureau of Justice Statistics, rape and sexual assault are more prevalent among American Indians than among the rest of the U.S. population. Between the years 1992 and 1996, seven out of 1000 American Indians were victims of rape or sexual assault, compared with two out of 1000 whites, three out of 1000 blacks, and one out of 1000 Asians. Lawrence A. Greenfield & Steven K. Smith, *American Indians and Crime*, Bureau of Justice Statistics Report Number NCJ-173386, February 1999, at 3, available at <http://www.ojp.usdoj.gov/bjs/pub/>. Data in this report show that in 1997, federal prosecutors brought 1126 cases against American Indians, and 47.5 % of these prosecutions were for crimes of violence; by contrast, only 6.7% of all federal prosecutions in that same year involved crimes of violence. *Id.* at 30. Overall, the number of federal prosecutions involving rape and sexual assault seems to be increasing. In 1994, the United States prosecuted 221 defendants on charges of rape, and ninety-three defendants on other sex offense charges. In 1995, the number of rape cases was 258, and the number of cases involving other sex offenses was 137. In 1996, these numbers were 275 and 388. In 1997, these numbers were 291 and 382. In 1998, these numbers were 307 and 472. The data were categorized differently after 1998, so it is difficult to evaluate whether this trend continued. The foregoing figures are set forth in the Bureau of Justice Statistics' Compendium of Federal Justice Statistics for the years 1994 through 1998 (NCJ-163063, NCJ-

the Justice Department created a special office—the Violence Against Women Office—which is charged with coordinating the prosecution of VAWA offenses, among other duties.⁶

As the number of federal prosecutions of violence against women has increased, so too has interest in revising the Federal Rules of Evidence (FRE) to facilitate such prosecutions. In 1995, for example, Congress passed a new evidentiary rule, FRE 413, to liberalize the admission of prior crimes evidence in federal prosecutions for sexual assault.⁷ Some in Congress have sought to relax the ban on propensity evidence in other prosecutions of violence against women.⁸ Other recent proposals would amend the Federal Rules of Evidence to

164259, NCJ-172849, NCJ-176328, and NCJ-180258, respectively). All of these reports are available on the Internet at <http://www.ojp.usdoj.gov/bjs/pub/> (last visited Jan. 30, 2003). While the figures for federal rape and sexual assault cases do not indicate which portion of the defendants were Native Americans, it is reasonable to assume that American Indians compose a large subset of the defendants in these cases, because federal jurisdiction over such offenses only arises in federal enclaves such as Indian reservations and military bases, and prosecutions of military personnel are not handled by the U.S. Department of Justice. *See United States v. LeMay*, 260 F.3d 1018, 1030 (9th Cir. 2001) (defendant, a Native American prosecuted for child molestation, claimed that the liberal standard for admitting prior crimes evidence under Federal Rule of Evidence 414 violated the Equal Protection Clause because most defendants who are prosecuted federally for such offenses are Native Americans; the court noted the disproportionate effect but rejected the Equal Protection claim).

6. During the Clinton Administration, this office was called the Violence Against Women Office. After George W. Bush became president in 2000, the name of the office was changed to the Office on Violence Against Women. In addition to assisting prosecutors who are handling VAWA cases, the office performs other functions such as administering over \$1 billion in grant funds. More information about the office is available at its web site at <http://www.ojp.usdoj.gov/vawo/> (last visited Jan. 30, 2003).

7. Rules 413 through 415, admitting prior bad acts to show propensity in cases involving sexual assault or child molestation, are unique in that these rules were not drafted by the Advisory Committee and promulgated through the Rules Enabling Act, as were most of the other Federal Rules of Evidence. These rules were simply created by Congress. The Judicial Conference actually opposed these rules, objecting to the prejudicial effect of the evidence that the rules would admit, as well as numerous drafting errors in the rules. 159 F.R.D. 51, 52 (1995). For a further discussion of the “politicization” of the Federal Rules of Evidence, see Daniel J. Capra, *Recipe for Confusion: Congress and the Federal Rules of Evidence*, 55 U. MIAMI L. REV. 691 (2001) (discussing Rule 704(b), the “Hinckley Rule”). Another useful resource is the transcript from a symposium held during the annual meeting of the Association of American Law Schools’ Evidence Section, entitled, *The Politics of [Evidence] Rulemaking*, 53 HASTINGS L.J. 733 (2002) (focusing on Rules 413-15 and Rule 704(b)); see also Eileen A. Scallen, *Analyzing “The Politics of [Evidence] Rulemaking,”* 53 HASTINGS L.J. 843 (2002) (commenting on symposium).

8. For example, Senator John Kyl proposed a bill in 1995 that would have suspended Rule 404(b) in certain cases involving domestic violence. A copy of the bill, S. 1483, is available on the internet at <http://nsi.org/Library/Legis/bill1483.txt> (last visited Jan. 30, 2003). In 1997, Senator Orrin Hatch offered a similar proposal and incorporated into the Omnibus Crime Control Bill, S.

admit out-of-court statements by victims of domestic violence.⁹ States have innovated a number of special evidentiary rules for cases involving domestic violence,¹⁰ and the suitability of these rules for federal court is an open question.

This short essay will consider whether the federal criminal justice system would benefit from adopting some of the new evidentiary rules that states have created for cases involving violence against women. In particular, this essay will address three questions. First, should the federal courts permit impeachment of a testifying defendant with his prior misdemeanor crimes involving domestic violence? Second, should the federal courts freely admit evidence of prior similar conduct to show propensity in a prosecution for a VAWA offense?

3, § 713, available at <http://www.airportnet.org/depts/federal/legisla2/s3.htm> (last visited Jan. 30, 2003). Neither Senator Kyl's proposal nor Senator Hatch's proposal was ever adopted by Congress.

9. Douglas E. Beloof & Joel Shapiro, 11 COLUM. J. GENDER & L. 1, 14 (2002) (suggesting that FRE 803 be amended to admit out-of-court statements by victim to police within twenty-four hours of alleged domestic violence); Neal A. Hudders, Note, *The Problem of Using Hearsay in Domestic Violence Cases: Is a New Hearsay Exception the Answer?*, 49 DUKE L.J. 1041, 1060 (2000) (arguing that after Congress has created special evidentiary rules for prosecutions of sexual assault and child molestation, a special hearsay exception for domestic violence cases would be appropriate); Donna M. Matthews, *Making a Crucial Connection: A Proposed Threat Hearsay Exception*, 27 GOLDEN GATE U. L. REV. 117, 160-64 (1997) (urging that FRE 804 be amended to admit out-of-court statement by deceased victim of domestic violence).

10. David M. Gersten, *Evidentiary Trends in Domestic Violence*, 72 FLA. B. J. 65, 65 (July/Aug. 1998) ("Recently, a number of states have amended both their statutes and evidence codes to ease the prosecution of domestic violence crimes"). Several authors have addressed the merit of these approaches in the context of state prosecutions of domestic violence, but little scholarship has considered whether the innovative state rules should be imported to federal court. See Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J. L. & FEMINISM 359 (1996); Peter R. Dworkin, *Confronting Your Abuser in Oregon: A New Domestic Violence Hearsay Exception*, 37 WILLAMETTE L. REV. 299 (2001); David M. Gersten, *Evidentiary Trends in Domestic Violence*, 72 FLA. BAR J. 65 (1998); Neal A. Hudders, *The Problem of Using Hearsay in Domestic Violence Cases: Is a New Exception the Answer?*, 49 DUKE L.J. 1041 (2000); Sarah J. Lee, *The Search for the Truth: Admitting Evidence of Prior Abuse in Cases of Domestic Violence*, 20 U. HAW. L. REV. 221 (1998); Linell A. Letendre, *Beating Again and Again and Again: Why Washington Needs a New Rule of Evidence Admitting Prior Acts of Domestic Violence*, 75 WASH. L. REV. 973 (2000); Lisa A. Linsky, *Use of Domestic Violence History Evidence in the Criminal Prosecution: A Common Sense Approach*, 16 PACE L. REV. 73 (1995); Donald W. North, *A License to Kill Your Spouse: A Critical Look at the Admissibility of Prior Acts Evidence as it Relates to the Louisiana Domestic Violence Exception*, 27 S.U. L. REV. 181 (2000); Debra Hayes Ogden, *Prosecuting Domestic Violence Crimes: Effectively Using Rule 404(b) to Hold Batterers Accountable for Repeated Abuse*, 34 GONZ. L. REV. 361 (1999); Myrna S. Raeder, *The Admissibility of Prior Acts of Domestic Violence: Simpson and Beyond*, 69 S. CAL. L. REV. 1463 (1996); Jeffrey S. Siegel, *Timing Isn't Everything: Massachusetts' Expansion of the Excited Utterance Exception in Severe Criminal Cases*, 79 B.U. L. REV. 1241 (1999).

Third, should the federal courts recognize a new hearsay exception for victims of domestic violence who speak to the police shortly after they are abused, whether or not the circumstances meet the requirements for traditional hearsay exceptions such as the excited utterance rule? Each of these questions will be addressed in turn below.

I. IMPEACHMENT WITH PRIOR MISDEMEANOR CRIMES OF DOMESTIC VIOLENCE

Currently, under FRE 609(a), a witness can be impeached with two categories of convictions: 1) felonies of any sort,¹¹ or 2) misdemeanor crimes involving dishonesty or false statement.¹² The rationale for admitting felonies to impeach a witness is that “the desperate person who would commit [a felony] would also lie under oath.”¹³ The rationale for admitting misdemeanor convictions involving dishonesty or false statement is self-evident: a conviction for dishonest conduct in the past suggests that the witness may testify falsely in the present proceeding. The two-tiered categorization of convictions under FRE 609(a) is consistent with a long tradition of case law preceding the adoption of the Rules.¹⁴

States have taken various approaches to impeachment with prior convictions. Twenty-five states have adopted FRE 609(a) virtually verbatim, and these states allow impeachment with either felonies or misdemeanors involving dishonesty.¹⁵

11. More precisely, FRE 609(a)(1) applies to crimes “punishable by death or imprisonment in excess of one year,” which will be referred to hereafter by the short-hand term “felonies.” FED. R. EVID. 609(a)(1).

12. The House-Senate Conference Committee Report on the original version of FRE 609(a) included this explanation: “By the phrase ‘dishonesty and false statement,’ the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused propensity to testify truthfully,” *reprinted in* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 2002 FEDERAL RULES OF EVIDENCE WITH ADVISORY COMMITTEE NOTES, LEGISLATIVE HISTORY, AND CASE SUPPLEMENT 146 (Aspen 2002).

13. *United States v. Lipscomb*, 702 F.2d 1049, 1053 (D.C. Cir. 1983) (quoting trial judge’s explanation for permitting impeachment with robbery conviction).

14. When FRE 609(a) was originally adopted, the Advisory Committee’s Note accompanying this rule summarized the traditional approach to impeachment: “The weight of traditional authority has been to allow use of felonies generally, without regard to the nature of the particular offense, and of *crimen falsi* without regard to the grade of the offense,” *reprinted in* MUELLER & KIRKPATRICK, *supra* note 12, at 142-43.

15. ALA. R. EVID. 609(a); ARIZ. R. EVID. 609(a); ARK. R. EVID. 609(a); DEL. R. EVID. 609(a); FLA. R. EVID. 609(a); IND. R. EVID. 609(a); IOWA R. EVID. 609(a); MAINE R. EVID. 609(a); MINN. R. EVID. 609(a); MISS. R. EVID. 609(a); NEB. R. EVID. 609(a); N.D. R. EVID. 609(a); N.H. R. EVID. 609(a); N.M. R. EVID. 609(a); OHIO R. EVID. 609(a); 12 OKLA. ST § 2609(a); S.C. R. EVID. 609(a); S.D. R. EVID. 609(a); TENN. R. EVID. 609(a); UTAH R. EVID. 609(a); VT. R. EVID. 609(a); WA. R.

Thirteen other states have adopted statutes that permit impeachment with convictions but do not limit these convictions to the categories set forth in FRE 609(a); judges in these states generally exercise their discretion to admit most felonies and also some misdemeanors involving moral turpitude and/or dishonesty.¹⁶ Five states allow impeachment with felony convictions, but not with misdemeanors of any sort.¹⁷ Five states permit impeachment with convictions for offenses involving dishonesty or false statement, but exclude all other convictions, even if they are felonies.¹⁸ Montana does not allow any

EVID. 609(a); W.V. R. EVID. 609(a); WYO. R. EVID. 609(a). The version of Rule 609(a) adopted in Texas permits impeachment with all felonies and misdemeanors involving "moral turpitude." TEX. R. EVID. 609(a); *Arnold v. State*, 36 S.W.3d 542, 546 (Tex. App. 2000) (crimes of moral turpitude include crimes of dishonesty and false statement).

16. COLO. REV. STAT. ANN. § 13-90-101 (West 2002) ("[T]he conviction of any person for any felony may be shown for the purpose of affecting the credibility of such witness."); 725 ILL. COMP. STAT. ANN. § 5/115-16 (West 2002) (conviction may be shown for the purpose of affecting the credibility of the witness); LA. CODE EVID. art. 609-1 (West 2002) (any conviction may be used to impeach a witness in a criminal case); MD. R. CT. 5-609(a) (West 2002) (conviction may be used for impeachment if "crime was an infamous crime or other crime relevant to the witness's credibility"); MASS. GEN. LAW ANN. ch. 233, § 21 (West 2002) (both misdemeanors and felonies may be used; misdemeanors must be no older than five years, and felonies must be no older than ten years); MO. ANN. STAT. § 491.050 (West 2002) ("any prior criminal convictions may be proved to affect [the witness'] credibility in a civil or criminal case"); N.C. R. EVID. 609(a) (convictions for felonies, Class A1 misdemeanors, Class 1 misdemeanors, and Class 2 misdemeanors may be used for impeachment); N.J. R. EVID. 609 ("For the purpose of affecting the credibility of any witness, the witness's conviction of a crime shall be admitted unless excluded by the judge as remote or for other causes."); N.Y. CPLR LAW § 4513 ("A person who has been convicted of a crime is a competent witness; but the conviction may be proved, for the purpose of affecting the weight of his testimony."); R.I. R. EVID. 609(a) (convictions for misdemeanors not involving dishonesty or false statement may be admitted, but the proponent must make an offer of proof outside the presence of the jury so the other side can contest admissibility; this special requirement does not apply to felonies or misdemeanors involving dishonesty or false statement); TEX. R. EVID. 609(a) (impeachment permissible with prior conviction "only if the crime was a felony or involved moral turpitude, regardless of punishment"); VA. CODE ANN. § 19.2-269 (West 2002) ("A person convicted of a felony or perjury shall not be incompetent to testify, but the fact of conviction may be shown to affect his credit."); WIS. STAT. ANN. § 906.09 (West 2002) (conviction for any crime may be used for impeachment). A Georgia statute allows impeachment of a testifying criminal defendant with unspecified types of prior convictions, but only if the defendant has "first put his character in issue." GA. CODE ANN. § 24-9-20(b) (2002).

17. CAL. EVID. CODE § 788 (West 2002) (only felonies can be used for impeachment); CONN. R. EVID. § 6-7 (felonies only); IDAHO R. EVID. 609 (felonies only); KY. R. EVID. 609(a) (felonies only); NEV. REV. STAT. ANN. § 50.095 (Michie 2002) (felonies only).

18. ALASKA R. EVID. 609(a) (for impeachment purposes, convictions are "only admissible if the crime involved dishonesty or false statement"); HAW. R. EVID. 609(a) ("For the purpose of attacking the credibility of the witness, evidence that the witness has been convicted of a crime is inadmissible except when the crime is one involving dishonesty."); KAN. CIV. PROC. CODE ANN.

impeachment with prior convictions.¹⁹

Oregon is the only state that has specifically tailored its version of Rule 609 for cases involving domestic violence. Prior to 2002, Oregon's Rule 609(a) followed the federal model, permitting impeachment with felonies and misdemeanor crimes involving dishonesty and false statement. As of January 1, 2002, a third category of convictions may be used for impeachment in Oregon. When a defendant is prosecuted for certain crimes of violence against a family or household member, and that defendant elects to testify, he may be impeached under Oregon's Rule 609 with a prior misdemeanor conviction for a crime involving assault, menacing, or harassment of a family or household member.²⁰

§ 60-421 (West 2002) ("Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impeaching his or her credibility"); MICH. R. EVID. 609(a) (impeachable offenses are limited to crimes involving dishonesty or false statement, or felony offenses involving theft); PA. R. EVID. 609(a) (only convictions for dishonesty or false statement may be used to impeach).

19. MONT. R. EVID. 609 ("For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is not admissible.").

20. OR. EVID. CODE § 609(2) now provides as follows:

(a) If a defendant is charged with one or more of the crimes listed in paragraph (b) of this subsection, and the defendant is a witness, evidence that the defendant has been convicted of committing one or more of the crimes against a family or household member, as defined in ORS 135.230, may be elicited from the defendant, or established by public record, and admitted into evidence for the purpose of attacking the credibility of the defendant:

- (A) Assault in the fourth degree under ORS 163.160.
- (B) Menacing under ORS 163.190.
- (C) Harassment under ORS 166.065.
- (D) Attempted assault in the fourth degree under ORS 163.160(1).
- (E) Attempted assault in the fourth degree under ORS 163.160(3).

(b) Evidence may be admitted into evidence for the purpose of attacking the credibility of a defendant under the provisions of this subsection only if the defendant is charged with committing one or more of the following crimes against a family or household member, as defined in ORS 135.230:

- (A) Aggravated murder under ORS 163.095.
- (B) Murder under ORS 163.115.
- (C) Manslaughter in the first degree under ORS 163.118.
- (D) Manslaughter in the second degree under ORS 163.118.
- (E) Assault in the first degree under ORS 163.185.
- (F) Assault in the second degree under ORS 163.175.
- (G) Assault in the third degree under ORS 163.165.
- (H) Assault in the fourth degree under ORS 163.160.
- (I) Rape in the first degree under ORS 163.375(1)(a).
- (J) Sodomy in the first degree under ORS 163.405(1)(a).
- (K) Unlawful sexual penetration in the first degree under ORS 163.411(a)(a).

In effect, misdemeanor crimes of domestic abuse are treated as if they were felonies for purposes of impeachment under Oregon's Rule 609.

Is it possible that the federal government might adopt Oregon's approach? Congress has recently determined that misdemeanor crimes of domestic violence are equivalent to felonies for purposes of the federal ban on firearm possession,²¹ so it is not inconceivable that Congress might one day expand Federal Rule of Evidence 609(a) to permit impeachment of witnesses with misdemeanor crimes involving domestic violence.

Before proceeding down this path, Congress should consider several flaws in Oregon's new impeachment rule. To begin with, convictions for misdemeanor crimes of domestic violence have dubious probative value when offered to impeach the credibility of a witness. The tendency of a witness to commit a misdemeanor-level assault does not suggest a tendency to lie while testifying under oath. Most state courts that have evaluated the probative value of such convictions for impeachment purposes have decided to exclude this evidence.

In *Hunter v. Staples*,²² the South Carolina Court of Appeals considered whether convictions for misdemeanor offenses of domestic violence should be

(L) Sexual abuse in the first degree under ORS 163.427(1)(a)(B).

(M) Kidnapping in the first degree under ORS 163.235.

(N) Kidnapping in the second degree under ORS 163.225.

(O) Burglary in the first degree under ORS 164.225.

(P) Coercion under ORS 163.275.

(Q) Stalking under ORS 163.732.

(R) Violating a court's stalking protective order under ORS 163.750.

(S) Menacing under ORS 163.190.

(T) Harassment under ORS 166.065.

(U) Attempting to commit a crime listed in this paragraph.

21. 18 U.S.C. § 922(g)(9) (2000), also known as the "Lautenberg Amendment," prohibits the possession of a firearm by any person who has been convicted of a misdemeanor crime of domestic violence. Before the passage of the Lautenberg Amendment in 1996, the only convictions that led to a firearms disability were felonies. *Id.* § 922(g)(1). During floor debates on the Lautenberg Amendment, Senator Lautenberg stressed that he thought a misdemeanor crime of domestic violence was just as pernicious as a felony crime. 142 CONG. REC. S10,377-78 (1996); 142 CONG. REC. S11,226 (1996). Senator Diane Feinstein, a supporter of the Lautenberg Amendment, stated the gun ban should apply to convicted domestic abusers regardless of "the classification of the conviction" as a misdemeanor or felony. 142 CONG. REC. S10,379 (1996). Senator Feinstein, Senator Paul Wellstone, and Representative Pat Schroeder all noted the variation in states' charging practices, which necessitated a generic federal definition of the predicate offense so that batterers would uniformly be denied the right to possess firearms whether or not the states in which they lived had classified domestic violence as a felony offense. 142 CONG. REC. 1,110,434 (1996); 142 CONG. REC. S10,379 (1996); 142 CONG. REC. S10,377 (1996). If domestic violence misdemeanors should be treated as felonies in the context of the gun ban under 18 U.S.C. § 922(g), it is a small step to argue that domestic violence misdemeanors should be treated as felonies in the context of FRE 609(a).

22. 515 S.E.2d 261 (S.C. Ct. App. 1999).

admissible to impeach the credibility of a party testifying in a civil case. The court held that “[t]he domestic violence convictions, however reprehensible, do not establish Hunter was deceitful or untruthful,” and therefore should not be admissible to impeach his credibility.²³

Similarly, in *State v. Newell*,²⁴ the New Hampshire Supreme Court held that a witness could not be impeached with a prior misdemeanor conviction for assaulting a woman, because this offense was “[not] probative of truthfulness or untruthfulness.”²⁵ Other courts have reached similar conclusions about the probative value of generic assault convictions in assessing the credibility of a witness.²⁶ The Hawaii Supreme Court could not discern “any rational connection” between “a crime of violence and the likelihood that the witness will tell the truth.”²⁷ If generic assault convictions are not probative of truthfulness, it is difficult to understand why a subset of assault convictions involving intimate partners should be admissible for impeachment.²⁸

23. *Id.* at 265.

24. 679 A.2d 1142 (N.H. 1996).

25. *Id.* at 1146.

26. *United States v. Akers*, 374 A.2d 874, 878 (D.C. 1977) (“[t]he crime of assault does not involve dishonesty or false statement,” so convictions for this crime should not be used to impeach); *State v. Norgren*, 616 A.2d 505, 507 (N.H. 1992) (determining that a conviction for misdemeanor assault did not involve dishonesty and should not be used for impeachment); *Commonwealth v. Williams*, 573 A.2d 536, 538-39 (Pa. 1990) (ruling that impeachment with assault conviction was improper because offense did not involve dishonesty; error was prejudicial and required reversal); *State v. Brown*, 583 N.E.2d 1331, 1334-35 (Ohio Ct. App. 1989) (determining that admission of misdemeanor assault conviction for impeachment was error because offense did not involve dishonesty); *State v. Darveaux*, 318 N.W.2d 44, 48 (Minn. 1982) (ruling that aggravated assault is not an offense that involves dishonesty).

27. *Asato v. Furtado*, 474 P.2d 288, 295 (Haw. 1970).

28. Perhaps one possible rationale for this distinction is that domestic assault involves betrayal of an intimate partner—which may demonstrate dishonesty to the extent that the assailant has implicitly pledged to protect and respect the intimate partner—while generic assault may often involve a stranger. Such a distinction is difficult to defend, however, because generic assaults could also involve friends or intimate partners. In fact, prosecutors often charge domestic violence offenses under generic assault statutes, and many states do not have any domestic assault statute. See 142 CONG. REC. S11,872-78 (1996) (statement of Sen. Lautenberg). Senator Lautenberg stated:

Mr. President, convictions for domestic violence-related crimes are often for crimes, such as assault, that are not explicitly identified as related to domestic violence. Therefore, it will not always be possible for law enforcement authorities to determine from the face of someone’s criminal record whether a particular misdemeanor conviction involves domestic violence.

Id.; see also *United States v. Barnes*, 295 F.3d 1354, 1365 n.12 (D.C. Cir. 2002) (according to government’s brief, only nineteen states have assault laws that include a relational element; the others prosecute domestic violence under generic assault statutes). Whatever the merit of the “betrayal theory” as a justification for admitting domestic assaults to impeach credibility, this rationale was not invoked at any time in the legislative history of Oregon’s unique impeachment

Not only do misdemeanor assault convictions lack probative value on the issue of credibility, they also pose a significant danger of prejudice by suggesting an inference of propensity. Indeed, the sponsors of Oregon's unusual impeachment rule explicitly urged that propensity evidence should be admissible in prosecutions of domestic violence. Their bill originally began as a proposal to amend Oregon's version of FRE 404(b) in order to liberalize the admission of propensity evidence in domestic violence cases.²⁹ When the Oregon House

rule, nor did the proponents of the rule offer any explanation as to why a misdemeanor crime involving domestic violence is probative of credibility. An appellate court in Texas has determined that, in impeaching a male defendant, a misdemeanor assault on a woman should be admissible, while a misdemeanor assault on a man should not. *Hardeman v. State*, 868 S.W.2d 404, 407 (Tex. Ct. App. 1993) (interpreting TEX. R. EVID. 609(a), which permits impeachment with any felony or a misdemeanor offense involving "moral turpitude"). The distinction drawn by the Texas court is not dependent on the "betrayal theory" or on the nature of the relationship between the male assailant and the female victim. Rather, the distinction appears to rest on notions of chivalry and on the difference between the physical strength of a man and woman. *Id.* ("We believe an assault by a man against a woman is generally regarded by the members of our society as more morally culpable than some other types of assaultive crimes."). Why wouldn't an attack by a man against a particularly weak or elderly male victim present the same "moral turpitude"?

29. The original proposal would have, *inter alia*, carved out the following exception to Oregon's Rule 404: "Notwithstanding any other provision of the Oregon Evidence Code, in a criminal action in which a defendant is charged with an offense involving domestic violence, evidence that the defendant has committed other acts of domestic violence is admissible unless the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusing the issues or misleading the jury." H.R. 3680, 71st Leg., Reg. Sess. (Or. 2001), *available at* <http://www.leg.state.or.us/01reg/measures/hb3600.dir/hb3680.intro.html>. The leading proponent of Oregon House Bill 3680, Gina Skinner of the Oregon District Attorney's Association, testified that the bill was modeled after California's 1997 law admitting propensity evidence in prosecutions of domestic violence. Ms. Skinner testified that, "ultimately, when the victim is ready to get out of that relationship, as a system we need to be there to help them, and to be able to prosecute the batterer for everything that they've done to that victim, and take into consideration those other acts as part of what happened." *Admissibility of Prior Domestic Violence Charges as Evidence of Current Domestic Violence Charge: Hearing on H.R. 3680 Before the Criminal Justice Subcomm. of the Oregon House Judiciary Comm.*, 71st Leg., Reg. Sess. 72A (Or. 2001) (statement of Gina Skinner, Oregon District Attorney's Assoc.). Representative Max Williams, Chair of the Oregon House Judiciary Committee and co-sponsor of House Bill 3680, commented during a hearing on April 24, 2001, that propensity evidence is valuable in domestic violence cases: "Most people understand that the odds are that if he's been beating her for 15 years [this evidence] does have a probative impact on whether or not it is more likely to have occurred in this case." *Id.* (statement of Rep. Max Williams, Chair of the Oregon House Judiciary Comm.). Representative Dan Doyle, another proponent of House Bill 3680, went so far as to describe the traditional ban on propensity evidence in domestic violence cases as an "oversight" in the Oregon Evidence Code: "Currently under the Oregon Evidence Code, evidence of a history of abusive behavior is not admissible in cases involving domestic violence, and this bill corrects the oversight in the that code, and ensures that past abuses count toward the conviction of current domestic violence offenders." *Id.*

Judiciary Committee expressed reservations about altering Rule 404 in domestic violence cases,³⁰ the proponents of the measure repackaged this proposal as an amendment of Federal Rule of Evidence 609, suggesting that the new bill represented a “compromise.”³¹ The justification for the measure was never changed, and, in particular, no proponent or legislator ever offered any analysis as to why domestic violence misdemeanors are somehow probative of credibility. The only justifications presented were thinly veiled discussions of propensity, using language such as “accountability,” rather than focusing on the probative value of these convictions as an indication of credibility.³²

30. For example, on April 24, 2001, Representative Lane Shetterly made the following comments in opposition to Oregon House Bill 3680:

Domestic violence is certainly one of the most difficult areas, and it's hard to turn away from that. But we know that burglary, for instance, is another crime in which usually you've caught somebody and they've got a long record of prior burglaries. Will we be looking at propensity evidence to convict burglars next? Where does it stop once we go this direction? I think this is a line that centuries of history have established, and it's a line that we don't want to cross, and frankly I'm not ready to. It's been a part of our law for centuries that we convict people on the basis of facts as applied to a particular case, and not just an array of facts over a period of time that tend to prove that the defendant is a bad actor and should go to jail anyway even if the facts of this particular charge can't be proven. And I think we need to be extremely cautious as we look to go down that road in terms of what we are doing to due process and fundamental constitutional rights. And I admit that this is one of those areas where the constitution gets in the way of where we sometimes would like to go. But I think we need to respect these constitutional limitations.

Id. (statement of Rep. Lane Shetterly).

31. At a hearing of the Subcommittee on Crime on May 10, 2001, Chair Williams announced that Ms. Skinner and others had revamped House Bill 3680, and “this bill essentially moves this whole issue over to a different part of the statute.” *Id.* (statement of Rep. Max Williams, Chair of the Oregon House Judiciary Comm.) Chairman Williams continued:

The idea here was, as we talked about this bill in its original form, was to determine if there was a way to deal with past evidence of actions where someone had been involved in domestic violence against a particular family member, but yet balancing the test that you just can't introduce that evidence necessarily for its propensity that this person had committed the crime.

Id. Bill Houser, representing the Oregon Criminal Defense Attorneys' Association, did not oppose the new version of House Bill 3680: “This is a reasonable compromise in our opinion.” *Id.* Representative Shetterly also acquiesced: “I'm not enthusiastic about it, but I can support. I do have a question about adding a B misdemeanor to the list of impeachment crimes, but if Mr. Houser's willing to sign off, then I'm not going to stand in the way.” *Id.*

32. See, e.g., written testimony of Katy Yetter, staff attorney with the Oregon Coalition Against Domestic and Sexual Violence, before the Oregon Senate Judiciary Committee, June 12, 2001 (“Allowing in evidence of prior convictions of misdemeanor domestic violence crimes (among others) for the purpose impeaching the perpetrator's credibility is one way to hold batterers accountable for their actions.”). *Id.* (statement of Katy Yetter, Staff Attorney, Oregon Coalition

No less an authority than the U.S. Supreme Court has held that admission of a prior assault conviction in a criminal prosecution for assault could give rise to harmful inferences of propensity. In *Old Chief v. United States*,³³ the defendant was tried on various charges including assault and possession of a firearm as a felon. The defendant offered to stipulate to the fact that he was a felon, rather than allow the prosecution to inform the jury of his prior felony conviction for assault. The prosecution declined to stipulate, and insisted on presenting evidence that showed the nature of the predicate offense. The Supreme Court reversed, holding that the similarity between the past assault conviction and the present assault charge was too prejudicial: "Old Chief sensibly worried that the prejudicial effect of his prior assault conviction, significant enough with respect to the current gun charges alone, would take on added weight from the related assault charge against him."³⁴ This analysis should underscore concerns about the prejudice that could result from Oregon's approach of admitting prior convictions for domestic abuse in a prosecution for a similar offense.

Ordinarily, the prejudicial effect of admitting prior similar acts in a criminal prosecution is addressed under FRE 404(b), but the expansion of FRE 609(a) to include domestic violence misdemeanors would render FRE 404(b) inconsequential. Trial judges would pay little attention to an objection under FRE 404(b) if the proffered evidence were cross-admissible under the revised version of FRE 609. Trial judges would be aware that appellate courts would likely dismiss as harmless any error in admitting such evidence under FRE 404(b) if the evidence were separately admissible under FRE 609.³⁵ What would the trial judge have to lose by admitting the evidence under both theories? In fact, the trial judge would increase her odds of withstanding appellate review by relying on both theories, either of which would be sufficient to uphold admission of the evidence. Thus, the amendment of FRE 609(a) to include misdemeanor crimes of domestic violence would effectively gut FRE 404(b) in prosecutions of violence against women.

There are a number of other harmful effects to consider. The adoption of Oregon's impeachment rule in federal court would cause great disparity between the treatment of Native Americans and the treatment of other ethnic groups in prosecutions of violence against women. Native Americans charged with such offenses are generally prosecuted in federal court (where the new impeachment rule would apply) while other defendants charged with violence against women are generally prosecuted in state court (where the traditional impeachment rules would apply). This disparate treatment might not rise to the level of violating the Equal Protection Clause,³⁶ but it is objectionable as a matter of policy. Why

Against Domestic and Sexual Violence).

33. 519 U.S. 172 (1997).

34. *Id.* at 185.

35. See, e.g., *United State v. Cordoba*, 104 F.3d 225, 229 (9th Cir. 1997); *United States v. Smith*, 49 F.3d 475, 478 (8th Cir. 1995).

36. In *United States v. LeMay*, 260 F.3d 1018, 1030-31 (9th Cir. 2001), a Native American man charged with child molestation challenged FRE 414, which admits prior acts of sexual

should Native Americans have fewer rights than other citizens in prosecutions for certain categories of crimes?

Another danger is that the liberalized admission of domestic violence misdemeanors in federal court could actually impose burdens on *victims* of domestic violence. If FRE 609(a) were amended simply to include domestic violence misdemeanors on the list of impeachable offenses—without limiting the application of this rule to criminal defendants—then conceivably such convictions could be admitted against victims who testified against their assailants. It is well established that victims of domestic violence often commit acts of violence themselves, either against their batterers or against their children.³⁷ FRE 609(a)(1) actually employs a more permissive balancing test when convictions are offered against witnesses as opposed to the accused.³⁸ A tragic irony could result: prior crimes of domestic violence would be more easily admissible against the testifying victim than against his or her assailant.

Given the questionable theoretical underpinnings of Oregon’s approach and the numerous practical problems that could arise, one would expect that proponents of this unusual impeachment rule would offer a compelling justification for departing from the traditional limitations on impeachable offenses. But no such justification has ever been offered. As State Representative Bob Ackerman noted during a hearing of Oregon’s House

molestation to show propensity, on the ground that this rule violates the Equal Protection Clause due to its disproportionate impact on Native Americans. The Ninth Circuit rejected LeMay’s argument, holding that, “this disproportion, if true, would arise simply because the federal government only has jurisdiction over crimes such as child molestation when they arise on Indian reservations, military bases, or other federal enclaves. There is no evidence of intent on the part of Congress to discriminate against Native Americans.” *Id.* at 1030. The Ninth Circuit also found that “Rule 414 does not burden a fundamental right,” and “sex offenders are not a suspect class,” so the rule could be upheld on the ground that it “bears a reasonable relationship to a legitimate governmental interest,” to wit, “[p]rosecuting crime effectively.” *Id.* at 1030-31.

37. See Mary E. Asmus et al., *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies from Understanding the Dynamics of Abusive Relationships*, 15 *HAMLIN L. REV.* 115, 151-53 (1991) (noting that, in training police to respond to cases in which women have attacked their male partners, it is sometimes difficult to distinguish between self-defense and mutual violence); Melissa Hooper, *When Domestic Violence Is No Longer an Option: What to do with the Female Offender*, 11 *BERKELEY WOMEN’S L.J.* 168, 173, 176-77 (1996) (observing that women may commit domestic violence as a result of the domestic violence that has been committed against them); see also Bill Bishop, *Abused Offenders: A Strong Link Exists Between Domestic Violence and Crimes Committed by Women, a Study Finds*, *EUGENE REGISTER-GUARD*, Oct. 27, 2002, at A1 (documenting that victims of domestic violence may respond with their own crimes).

38. In order to admit a felony conviction for impeachment of a witness, the proponent must demonstrate that the probative value of the conviction is not substantially outweighed by its prejudicial effect. By contrast, in order to admit a felony conviction for impeachment of the accused, the proponent must demonstrate that the probative value of the conviction outweighs its prejudicial effect—a more difficult test for the proponent. *FED. R. EVID.* 609(a).

Judiciary Committee, “[n]o evidence has been shown before the committee today that the prosecutors need this [bill] as a tool to secure convictions. They’re not telling me they’re losing cases because this bill is not law.”³⁹ Research for the present article has not discovered any scholarship indicating that the restrictions of the current federal impeachment rules are preventing prosecutors from winning convictions in VAWA cases. The U.S. Department of Justice has not sought a change in impeachment rules for prosecutions of violence against women: in fact, there are only two acquittals per year among the hundreds of VAWA cases prosecuted in federal court.⁴⁰ Prior sex crimes are already admitted freely pursuant to FRE 413 in federal prosecutions for sexual offenses, and prior misdemeanor crimes of domestic violence can already be admitted under FRE 404(b) to show motive, intent, absence of mistake, and common plan or scheme. In VAWA prosecutions where the defendant denies that he has committed domestic violence before, prosecutors can invoke FRE 801 to impeach the defendant with his prior statements, including guilty pleas⁴¹ or out-of-court threats of violence.⁴² There simply has been no showing of a sufficiently urgent reason to discard the time-honored approach to impeachment under FRE 609.

II. PRIOR ACTS OF DOMESTIC VIOLENCE AS PROOF OF PROPENSITY

Another area in which states have innovated special rules for domestic violence cases is the use of propensity evidence. In federal court, FRE 404(b) provides that evidence of prior crimes, wrongs, or acts cannot be introduced to prove the character of a person in order to show action in conformity therewith.

39. Comments of Representative Robert Ackerman during hearing of Criminal Justice Subcommittee of Oregon House Judiciary Committee, Apr. 24, 2001. *Admissibility of Prior Domestic Violence Charges as Evidence of Current Domestic Violence Charge: Hearing on H.R. 3680 Before the Criminal Justice Subcomm. of the Oregon House Judiciary Comm.*, 71st Leg., Reg. Sess. 72A (Or. 2001) (statement of Rep. Robert Ackerman).

40. According to data supplied to the author in a fax from the Executive Office of U.S. Attorneys on January 16, 2003, the average number of defendants acquitted in VAWA cases between 1996 and 2002 was two per year. Zero defendants were acquitted in 1995; zero in 1996; zero in 1997; two in 1998; one in 1999; four in 2000; five in 2001; and three in 2002 (based on extrapolation of statistics compiled through June of 2002). A facsimile from the Executive Office of U.S. Attorneys to author (Jan. 16, 2003) [hereinafter Executive Office of U.S. Attorneys fax] (on file with author).

41. Prior guilty pleas to crimes of domestic violence would be admissible under FRE 801(d)(1)(A) to impeach the defendant’s testimony that he has not committed domestic violence in the past.

42. Such threats would not be admissible under FRE 801(d)(1)(A) because they were not made in court, but they might nonetheless be admissible to impeach the defendant’s assertion that he has not previously committed domestic violence. The statements would overcome a hearsay objection because they are admissions by a party opponent under FRE 801(d)(2)(A), and they could be categorized as non-hearsay under FRE 801(c) in that they are verbal acts rather than statements offered for the truth of the matter asserted.

The purpose of this rule is to prevent the jury from drawing an inference of propensity—"once a criminal, always a criminal."⁴³ While most states have adopted this rule in one form or another, a growing number of states have created exceptions for prosecutions of domestic violence, permitting the introduction of evidence concerning prior abuse to prove that the defendant committed the presently charged offense.⁴⁴

The California State Assembly was at the forefront of this movement, passing a law in 1996 that essentially waived the ban on propensity evidence in prosecutions of domestic violence. Senate Bill 1876, later codified in Section 1109 of the California Evidence Code,⁴⁵ was known as the "Nicole Brown

43. For an excellent discussion of the theory underlying FRE 404(b), see EDWARD J. IMWINKELRIED, *UNCHARGED MISCONDUCT EVIDENCE* § 1:03 (Callaghan 1984); see also David P. Leonard, *Character and Motive in Evidence Law*, 34 LOY. L.A. L. REV. 439 (2001); David J. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 IND. L.J. 1161 (1998).

44. Several states have created what is in effect a domestic violence exception to the ban on propensity evidence. See ALASKA R. EVID. 404(b)(4) (admitting evidence of prior domestic violence against same victim, or evidence of prior interference with a report of a crime involving domestic violence); CAL. EVID. CODE § 1109 (admitting evidence of prior domestic violence to show propensity); 725 ILL. COMP. STAT. 5/115-20 (admitting evidence of prior domestic violence against same victim); LA. R. EVID. 404(b)(2) (allowing evidence of prior domestic violence to show violent propensity of abuser where victim is prosecuted for attacking abuser, and victim raises claim of self-defense); see also ARIZ. R. EVID. 404(c) (admitting evidence of prior sexual assault to show propensity, where defendant is now charged with sexual assault); FLA. R. EVID. 404(2)(b) (admitting evidence of prior child molestation to show propensity, where defendant is now charged with child molestation). At least three states have considered and rejected such proposals.

In 2002, the Michigan Legislature considered, but did not ultimately adopt, a bill that would have admitted evidence of prior domestic violence to prove propensity in a prosecution of domestic violence. S.B. 733, 2002 Leg. (Mich. 2002), available at <http://www.bar.org/legislative.positions.htm> (the Michigan State Bar opposed this proposal). In 2001, the Oregon Legislature refused to adopt a bill that would have emulated CAL. EVID. CODE § 1109. See *supra* note 29 and accompanying text. In 1999, the New York Legislature refused to adopt a provision of Governor Pataki's proposed Sexual Assault Reform Act that would have freely admitted propensity evidence in sexual assault cases. Brooks Holland, *Section 60.41 of the New York Criminal Procedure Law: The Sexual Assault Reform Act of 1999 Challenges Molineux and Due Process*, 27 FORDHAM URB. L.J. 435, 479 (1999).

45. CAL EVID. CODE § 1109(a) provides that, "in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 [the general bar against propensity evidence] if the evidence is not inadmissible pursuant to Section 352 [California's analog to FRE 403, giving the court general discretion to exclude prejudicial evidence]." CAL. EVID. CODE § 1109(e) provides that, "[e]vidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice." CAL. EVID. CODE § 1109(f) provides that, "[e]vidence of the findings and determinations of administrative agencies regulating the conduct of health facilities licensed

Simpson Law," because its sponsors were outraged by the exclusion of prior acts evidence in the murder trial of O.J. Simpson.⁴⁶ The explicit purpose of this bill was to strengthen the government's hand in prosecuting defendants accused of domestic violence.⁴⁷ The Committee Report on Senate Bill 1876 argued that if this bill did not become law, "we will continue to see cases where perpetrators of this violence 'will beat their intimate partners, even kill them, and go on to beat or kill the next intimate partner.'"⁴⁸

Should Congress import California's rule into the Federal Rules of Evidence? To some extent, Congress already has. FRE 413 provides that, in prosecutions for sexual assault, the government may introduce evidence of prior acts involving sexual assault, and may offer this evidence to show the defendant's propensity for committing such offenses. FRE 414 sets forth a similar rule for prosecutions of child molestation. Congress passed the legislation establishing both of these rules in 1995, over the strong objection of the Advisory Committee that typically plays a role in drafting revisions of the Federal Rules of Evidence.⁴⁹ Some commentators have justified these rules on a number of grounds: 1) the difficulty of prosecuting charges of sexual assault and child molestation because victims are often unwilling or unable to testify; 2) the unique tendency of sex offenders and child molesters to commit these offenses over and over again; and 3) the need to hold past offenders "accountable" for their crimes.⁵⁰ On the other hand, many commentators have

under Section 1520 of the Health and Safety Code is inadmissible under this section."

46. For a discussion of the Simpson trial and how it affected the debate over the admission of propensity evidence in prosecutions of violence against women, see Myrna S. Raeder, *The Admissibility of Prior Acts of Domestic Violence: Simpson and Beyond*, 69 S. CAL. L. REV. 1463 (1996); see also B.J. Palermo, *A Rush to Reform: Critics Fear Some Simpson-Inspired Changes Are Misguided*, 83 A.B.A.J. 20, 20 (1997).

47. Lisa Marie De Sanctis, a Deputy District Attorney in Ventura County, California, and a co-author of Senate Bill 1876, stated her belief that "the propensity argument is a common-sense, reasonable argument." Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 388 (1996). She offered the following practical justifications for the new law:

[T]here are several problems that arise in prosecuting domestic violence cases. The hurdles that occur prior to trial include the uncooperative or recanting victim, few or no witnesses, and a lack of any documented physical evidence. The problems during a trial include juror mind-block, gender bias, victim credibility, and the generally prejudicial views about domestic violence held by the general population and therefore by most jurors. Evidence of uncharged domestic violence can overcome many, if not most of these prosecution problems.

Id. at 397.

48. Andrew J. Glendon, *Battling Domestic Violence Through the Admission of Character Evidence*, 28 PAC. L.J. 789, 791 n.14 (1997) (quoting Assembly Committee on Public Safety, Committee Analysis of S.B. 1876, at 4 (June 25, 1996)).

49. See *supra* note 7.

50. The following authors have, to varying degrees, supported the approach taken by

criticized FRE 413 and FRE 414 on the following grounds, among others: 1) the prejudicial effect of propensity evidence in a criminal trial; 2) the theoretical inconsistency of these rules with FRE 404(b); 3) the lack of empirical evidence demonstrating a higher rate of recidivism among sex offenders and child molesters than among other offenders; and 4) the disproportionate effect of these rules on Native Americans.⁵¹ Whatever the merit of the approach embodied in

Congress in FRE 413 and FRE 414, although some of these authors have expressed reservations about certain aspects of the rules. David P. Bryden & Roger C. Park, *Other Crimes Evidence in Sex Offender Cases*, 78 MINN. L. REV. 529 (1994); Paul G. Cassell & Evan S. Strassberg, *Evidence of Repeated Acts of Rape and Child Molestation: Reforming Utah Law to Permit the Propensity Inference*, 1998 UTAH L. REV. 145 (1998); David M. De La Paz, *Sacrificing the Whole Truth: Florida's Deteriorating Admissibility of Similar Fact Evidence in Cases of Child Sexual Abuse*, 15 N.Y.L. SCH. J. HUM. RTS. 449 (1999); Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 388 (1996); Karen M. Fingar, *And Justice for All: The Admissibility of Uncharged Sexual Misconduct*, 5 S. CAL. REV. L. & WOMEN'S STUD. 501 (1996); Jill C. Legg, *South Dakota Supreme Court: State v. Ondricek: Admission of Prior Bad Acts—The Exception or the Rule?*, 42 S.D. L. REV. 165 (1997); Margaret C. Livnah, *Branding the Sexual Predator: Constitutional Ramifications of Federal Rules of Evidence 413 through 415*, 44 CLEV. ST. L. REV. 169 (1996); Aviva Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials*, 49 HASTINGS L.J. 663 (1998); William C. Robinson, Jr., Comment, *Go West Florida! Adopt Recent Federal Exceptions to Inadmissible Character Evidence and Follow the Modifications in Both California and Arizona*, 29 STETSON L. REV. 1363 (2000); Debra Sherman Tedeschi, Comment, *Federal Rule of Evidence 413: Redistributing "the Credibility Quotient,"* 57 U. PITT. L. REV. 107 (1995); Jeffrey Waller, Comment, *Federal Rules of Evidence 413-415: "Laws are Like Medicine; They Generally Cure an Evil by a Lesser . . . Evil,"* 30 TEX. TECH. L. REV. 1503 (1999); Mary Katherine Danna, Note, *The New Federal Rules of Evidence 413-415: The Prejudice of Politics or Just Plain Common Sense?*, 41 ST. LOUIS L.J. 277 (1996); Ellen H. Meilaender, Note, *Revising Indiana's Rule of Evidence 404(b) and the Lannan Decision in Light of Federal Rules of Evidence 413-415*, 75 IND. L.J. 1103 (2000); Erik D. Ojala, Note, *Propensity Evidence Under Rule 413: The Need for Balance*, 77 WASH. U. L. Q. 947 (1999); Lisa M. Segal, Note, *The Admissibility of Uncharged Misconduct Evidence in Sex Offense Cases: New Federal Rules of Evidence Codify the Lustful Disposition Exception*, 29 SUFFOLK U. L. REV. 515 (1995).

51. The following authors have criticized FRE 413 and 414. Holland, *supra* note 44, at 435; Edward J. Imwinkelried, *Perspectives on Proposed Federal Rules of Evidence 413-415: Undertaking the Task of Reforming the American Character Evidence Prohibition: The Importance of Getting the Experiment off on the Right Foot*, 22 FORDHAM URB. L.J. 285 (1995); R. Wade King, *Federal Rules of Evidence 413 and 414: By Answering the Public's Call for Increased Protection From Sexual Predators, Did Congress Move Too Far Toward Encouraging Conviction Based on Character Rather Than Guilt?*, 33 TEX. TECH. L. REV. 1167 (2002); David P. Leonard, *Character and Motive in Evidence Law*, 34 LOY. L.A. L. REV. 439 (2001); David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 IND. L.J. 1161 (1998); David P. Leonard, *Perspectives on Proposed Federal Rules of Evidence 413-415: The Federal Rules of Evidence and the Political Process*, 22 FORDHAM URB. L.J. 305 (1995); James S. Liebman, *Proposed Evidence Rules 413 to 415—Some Problems and*

FRE 413 and 414, some in Congress have already proposed that the approach be extended to all categories of violence against women, along the lines of California's model.⁵²

Congress should reject this proposal for several reasons. First, there is no practical necessity for Congress to adopt a federal version of California's section 1109. The existing Federal Rules of Evidence do not significantly impede the admission of propensity evidence in federal prosecutions of violence against women. Approximately one-half of such cases involve charges of sexual assault on Indian reservations,⁵³ and propensity evidence is already freely admissible in these cases pursuant to FRE 413 and 414. Among the other half of federal cases involving violence against women, a significant number are prosecutions brought under the VAWA. Many of the VAWA offenses require proof of specific intent (e.g., crossing state lines with the intent to commit domestic violence,⁵⁴ violate a restraining order,⁵⁵ or stalk the victim⁵⁶); in prosecutions of these charges, the existing version of FRE 404(b) would allow evidence of prior domestic violence to prove intent, or common plan or scheme.⁵⁷

Recommendations, 20 U. DAYTON L. REV. 753 (1995); Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 BYU L. REV. 1547 (1998); Joelle Anne Moreno, "Whoever Fights Monsters Should See to it That in the Process He Does Not Become a Monster": Hunting the Sexual Predator with Silver Bullets—Federal Rules of Evidence 413-415 and a Stake Through the Heart—Kansas v. Hendricks, 49 FLA. L. REV. 505 (1997); Joseph A. Aluisse, Note, *Evidence of Prior Sexual Misconduct in Sexual Assault and Child Molestation Proceedings: Did Congress Err in Passing Federal Rules of Evidence 413, 414, and 415?*, 14 J. L. & POL. 153 (1998); Adam Kargman, Note, *Three Maelstroms and One Tweak: Federal Rules of Evidence 413 to 415 and Their Arizona Counterpart*, 41 ARIZ. L. REV. 963 (1999); Heather E. Marsden, Note and Comment, *State v. Hopkins: The Stripping of Rhode Island Rule of Evidence 404(b) Protections from Accused Sexual Offenders*, 3 ROGER WILLIAMS L. REV. 333 (1998); Jason L. McCandless, Note, *Prior Bad Acts and Two Bad Rules: The Fundamental Unfairness of Federal Rules of Evidence 413 and 414*, 5 WM. & MARY BILL OF RTS. J. 689 (1997); Daniel L. Overbey, Note, *Federal Rule of Evidence 415 and Paula Corbin Jones v. William Jefferson Clinton: The Use of Propensity Evidence in Sexual Harassment Suits*, 12 NOTRE DAME J. L. ETHICS & PUB. POL'Y 343 (1998); Jeffrey G. Pickett, Note and Comment, *The Presumption of Innocence Imperiled: The New Federal Rules of Evidence 413-15 and the Use of Other Sexual-Offense Evidence in Washington*, 70 WASH. L. REV. 883 (1995).

52. See *supra* note 8.

53. See *supra* notes 4-5.

54. 18 U.S.C. § 2261 (1994).

55. *Id.* § 2262.

56. *Id.* § 2261A.

57. FRE 404(b) allows the introduction of evidence concerning prior crimes, wrongs or acts when the evidence is introduced for some purpose other than supporting a propensity inference. This evidence may be used to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." FED. R. EVID. 404(b). FRE 404(b) probably would not allow evidence of prior domestic violence in a prosecution under the gun ban for convicted domestic abusers (18 U.S.C. §§ 922(g)(8) and 922(g)(9) (1994)), which is generally considered to be part of the Violence Against Women Act. However, evidence of prior domestic violence might

A recent search in the Westlaw database discovered no VAWA case in which 404(b) evidence offered by the prosecution has been excluded. In fact, federal courts have admitted this evidence with virtually no reservations. In prosecutions for interstate travel to violate a restraining order, courts have admitted evidence of prior violations to show intent under FRE 404(b).⁵⁸ In prosecutions for interstate travel to commit domestic violence, courts have admitted evidence of prior abuse to show the defendant's state of mind pursuant to FRE 404(b).⁵⁹ Prior acts of domestic violence have also been admitted under FRE 404(b) in prosecutions for interstate travel to commit stalking.⁶⁰ A total of five circuit courts have upheld convictions in VAWA cases where the prosecution introduced 404(b) evidence concerning prior domestic abuse.⁶¹ As one court of appeals noted, all three of the VAWA offenses involving interstate travel "put [the defendant's] intent directly at issue," so the admission of 404(b) evidence proving prior acts of domestic violence is "clearly correct."⁶²

By contrast, state prosecutions of violence against women often involve general intent crimes such as battery, for which the traditional version of Rule

be admissible under a separate evidentiary theory in these gun prosecutions: the evidence could be used to prove the predicate offense or restraining order that is the basis for the firearms disability, subject to the limitations set forth in *United States v. Old Chief*, 519 U.S. 172 (1997) (plurality opinion) (requiring the prosecution to accept defendant's offer to stipulate on predicate offense). In any event, even if section 1109 of the California Evidence Code were imported into the FRE, the prosecutions under the gun ban would not count as prosecutions of domestic violence, so federal prosecutors could not avail themselves of the more lenient rules for admission of propensity evidence. Thus, when one considers the universe of federal prosecutions of violence against women (sexual assaults on Indian reservations, the VAWA offenses involving interstate travel, and the VAWA offenses involving unlawful possession of firearms), there would be very little difference in the admissibility of propensity evidence if the California rule were adopted in federal court.

58. *United States v. Hermundson*, No. 97-10497, slip op. (9th Cir. Jan. 14, 2000) (affirming admission of prior violations of restraining order admissible to show that defendant crossed state lines with intent to violate restraining order again); *United States v. Ruggles*, No. 98-5477 (6th Cir. Mar. 24, 2000) (affirming admission of "other acts" evidence); *United States v. Von Foelkel*, 136 F.3d 339, 341 (2d Cir. 1998) (upholding admission of defendant's prior bad acts).

59. *United States v. Jacobs*, 244 F.3d 503, 507 (6th Cir. 2001) (admitting evidence of other domestic violence to show common scheme or plan); *Ruggles*, No. 98-5477 (prior acts of domestic violence admissible to show intent, which is element of offense of interstate travel to commit domestic violence); see also *United States v. Lankford*, 196 F.3d 563, 568 (5th Cir. 1999) (noting, but not reviewing, trial court's admission of extensive evidence concerning prior domestic violence).

60. *United States v. Young*, 248 F.3d 260, 271-72 (4th Cir. 2001) (evidence that defendant had assaulted victim's mother was admissible under FRE 404(b) to show defendant's state of mind); *Ruggles*, No. 98-5477.

61. See *supra* notes 58-59.

62. *Ruggles*, No. 98-5477.

404(b) would be less useful.⁶³ Moreover, state law enforcement agents do not have the tremendous investigative resources that are available to federal law enforcement agents. The limited resources and time available in state investigations creates a greater need for evidence of prior domestic violence. In sum, the practical justifications for admitting propensity evidence in prosecutions of violence against women are not as strong in federal court as they are in state court.

Even if a federal version of California's section 1109 might help to secure more convictions, these convictions would come at too great a price. The abrogation of FRE 404(b) in VAWA cases would cause significant prejudice to criminal defendants. In fact, the social opprobrium that has led publicity-seeking politicians to pass special laws for domestic violence cases is the very reason why the government's introduction of prior abuse to show propensity could so inflame the jury that the defendant might never receive a fair trial.⁶⁴ In another context, Chief Justice Earl Warren of the U.S. Supreme Court explained the potentially devastating effect of propensity evidence:

Evidence of prior convictions has been forbidden because it jeopardizes the presumption of innocence of the crime currently charged. A jury might punish an accused for being guilty of a previous offense, or feel that incarceration is justified because the accused is a "bad man," without regard to his guilt of the crime currently charged. . . . Recognition to the prejudicial effect of prior-convictions evidence has traditionally been related to the requirement of our criminal law that the State prove beyond a reasonable doubt the commission of a specific criminal act. . . . Because of the possibility that the generality of the jury's verdict might mask a finding of guilt based on an accused's past crimes or unsavory reputation, state and federal courts have consistently refused to admit evidence of past crimes except in circumstances where

63. Some state courts have reasoned that because battery is a general intent crime, evidence of prior bad acts should not be admissible under the state's version of FRE 404(b) in a prosecution for battery. *State v. Kennedy*, 803 So.2d 916, 923 (La. 2001) (in a prosecution of a general intent crime, "evidence of extraneous crimes is inadmissible for the ostensible purpose of showing such intent"); *People v. Sabin*, 614 N.W.2d 888, 902 (Mich. 2000) ("the evidence [of prior sexual misconduct] was not relevant to prove defendant's general intent"); *Curtis v. State*, 89 S.W.3d 163, 175 (Tex. App. 2002) (where intent was obvious from nature of assault, "the offer of other crimes is unjustified due to lack of relevancy"). The issue of intent is not as important in these prosecutions as it is in federal VAWA prosecutions, so FRE 404(b)'s exception for evidence offered to show intent is less helpful to state prosecutors. This difference may explain why state prosecutors have advocated more strenuously than federal prosecutors for changes in the rules barring propensity evidence in prosecutions of domestic violence.

64. Many authors have noted the prejudicial effect of prior crimes evidence admitted under FRE 413 and FRE 414. *E.g.*, Pickett, *supra* note 51, at 899-902. *See supra* note 51 for a long list of other articles making the same argument.

it tends to prove something other than general criminal disposition.⁶⁵

Although this danger arguably does not rise to the level of a Due Process violation,⁶⁶ it is at least a serious policy concern that should dissuade Congress from adopting California's rule.

The admission of evidence concerning prior acts of domestic violence could cause additional problems in federal trials. Proving these acts (especially uncharged acts) could require a great deal of time and might necessitate a "mini-trial" in the midst of the prosecution in which the evidence is offered. Although the prior act need not be proven beyond a reasonable doubt, the prosecution must offer sufficient proof from which a rational jury could conclude that the prior act occurred.⁶⁷ The reluctance of victims to cooperate⁶⁸ might necessitate the introduction of testimony by police officers, crime scene investigators, criminalists who processed scientific evidence, neighbors who heard the victim's statements, etc. Although courts might be solicitous of such wide-ranging evidence when offered as direct proof of the presently charged offense, a long

65. *Spencer v. Texas*, 385 U.S. 554, 575 (1967) (Warren, C.J., concurring in part and dissenting in part) (citations omitted); *accord* *United States v. Old Chief*, 519 U.S. 172, 180, 182, 185 (1997) (holding that introduction of prior assault conviction caused impermissible prejudice when defendant was presently charged with assault, among other offenses).

66. The following cases upheld Section 1109 of the California Evidence Code against constitutional challenges: *People v. Johnson*, 478 P.2d 26, 32 (Cal. Ct. App. 2000); *People v. Hoover*, 92 Cal. Rptr. 2d 208, 210-11 (Ct. App. 2000). Federal courts have also upheld the constitutionality of FRE 413 and FRE 414. *E.g.*, *United States v. LeMay*, 260 F.3d 1018, 1026-27 (9th Cir. 2001) (FED. R. EVID. 414); *United States v. McHorse*, 179 F.3d 889, 896-98 (10th Cir. 1999) (FED. R. EVID. 414); *United States v. Mound*, 149 F.3d 799, 800-01 (8th Cir. 1998) (FED. R. EVID. 413); *United States v. Castillo*, 140 F.3d 874, 880 (10th Cir. 1998) (FED. R. EVID. 414) (does not on its face violate the Due Process Clause of the Federal Constitution); *United States v. Enjady*, 134 F.3d 1427, 1433 (10th Cir. 1998) (FED. R. EVID. 413).

67. *Huddleston v. United States*, 485 U.S. 681, 685 (1988). A prosecutor will strive for a higher quantum of proof if the evidence is to have any persuasive value.

68. It is well documented that victims of domestic violence sometimes recant or refuse to cooperate after filing complaints against their assailants. *People v. Gomez*, 85 Cal. Rptr. 2d. 101, 105 (Ct. App. 1999) (psychologist testified that "about 80 percent of the time a woman who has been sexually assaulted by a boyfriend, husband or lover will recant, change or minimize the story"); Angela Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 *FORDHAM L. REV.* 853, 854-55 (1994) ("In many jurisdictions, prosecutors routinely drop domestic violence cases because the victim requests it, refuses to testify, recants, or fails to appear in court"); *see also* Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 *HARV. L. REV.* 1849, 1883-84 (1996) (describing the complexity of victim's role in abusive relationship). Victims of domestic violence may refuse to cooperate for a number of reasons, including financial concerns, fear of retaliation, low self-esteem, and sympathy for the assailant. Thomas I. Kirsch II, *Problems in Domestic Violence: Should Victims be Forced to Participate in the Prosecution of Their Abusers?*, 7 *WM. & MARY J. WOMEN & L.* 383, 392-99 (2001).

diversion to prove a prior act may be a game that is not worth the candle.

A final reason to eschew California's section 1109 in federal court is the need to preserve theoretical cohesion within the Federal Rules of Evidence. Inconsistency in the rules makes them less predictable, creates the appearance of unequal treatment, and erodes the legitimacy of the entire justice system. It would be difficult to present a principled argument that prior crimes of domestic violence should be admissible to show propensity in VAWA prosecutions, but that prior hate crimes should not be admissible to show propensity in prosecutions of hate crimes or that prior acts of terrorism should not be admissible to show propensity in prosecutions for terrorism, etc.

In the end, California's section 1109 seems an ill fit for the federal courts. Its justification is greater, and its harms less difficult to reconcile, in state prosecutions of general intent crimes, as opposed to federal prosecutions of specific intent crimes in VAWA.

III. HEARSAY STATEMENTS BY VICTIMS OF DOMESTIC VIOLENCE

Some states have created special hearsay exceptions for statements by victims of domestic violence. Most of these exceptions are solely available for child victims,⁶⁹ but a few states have created exceptions for adult victims.⁷⁰ The

69. *E.g.*, ALASKA STAT. § 12.40.110 (Michie 2002); ARK. R. EVID. 803(25) (West 2002); ARIZ. STAT. § 13-1416 (West 2002); CAL. EVID. CODE § 1228; COLO. REV. STAT. ANN. § 13.25-129 (West 2002); DEL. CODE. tit. 11, § 3513 (2002); FLA. STAT. ANN. § 90.803(23) (West 2002); GA. CODE ANN. § 24-3-16 (2002); IDAHO CODE § 19-3024 (Michie 2002); ILL. COMP. STAT. ANN. 725 § 5/115-10 (West 2002); MICH. R. EVID. 803(A); MINN. STAT. ANN. § 595.02(3) (2002); MISS. R. EVID. 803(25); OR. EVID. CODE 803(18) & 803(24); PA. STAT. ANN. tit. 42 § 5986; TEX. CODE CRIM. PROC. ANN. § 38.072 (Vernon 2002); UTAH CODE ANN. § 76-5-411 (2002); WASH. REV. CODE ANN. § 9A.44.120 (West 2002). As Judge Gersten has explained, "[t]ypical statutes permitting statements regarding child abuse require the court to conduct an in-camera hearing, determine the statement reliable, establish corroboration, and require the child (usually around 10 years old) to testify, if the child is not unavailable." Gersten, *supra* note 10, at 66 n.24.

70. CAL. EVID. CODE § 1370(a)(c) (allowing the admission of hearsay statements by victims of domestic violence who are now unavailable to testify); OR. EVID. CODE 803(26) (admitting hearsay statements made by victim of domestic violence within twenty-four hours of incident, whether or not victim is presently available as a witness). The Supreme Court of Kansas has ruled that in marital homicide cases, prior threats against the victim are admissible as non-hearsay, if offered to prove identity, motive, or intent. Christine Arguello, *The Marital Discord Exception to Hearsay: Fact or Judicially Legislated Fiction?*, 46 U. KAN. L. REV. 63, 64, 76-77 (1997) (arguing that the Supreme Court of Kansas has in effect legislated a new hearsay exception for domestic violence cases). The General Assembly of Illinois is now considering a bill, S.B. 2120, which was proposed in the Spring 2002 session, that would allow for the admission of out-of-court statements by a victim of domestic violence whose failure to testify is due to intimidation by the defendant. More information about this bill is available on the website of the bill's chief sponsor, Senator Lisa Madigan, http://www.lisamadigan.org/issues/domestic_violence.htm (June 2002) and http://www.lisamadigan.org/press_pages/domestic_violence.htm (Feb. 12, 2002). The Michigan

purpose of these exceptions is to provide an avenue for the admission of victims' statements that would not be admissible under the traditional hearsay exceptions for victims of violent crime,⁷¹ such as the exception for excited utterances,⁷² the exception for statements in aid of medical treatment or diagnosis,⁷³ the "catch-all exception,"⁷⁴ and the exception for prior inconsistent statements by the witness.⁷⁵ Proponents of a special hearsay exception for domestic violence cases cite the tendency of the victim to recant or change her testimony in favor of her assailant,⁷⁶ leaving the prosecution with little evidence of the abuse other than the

Legislature considered a similar bill in its 2001-2002 session, HB 4765, that would admit a statement by a victim of domestic violence at or near the time of the incident, if the statement was made in writing, was electronically recorded, or was made to a law enforcement official. More information about this bill is available at the website of the Michigan State Bar, <http://www.michbar.org/legislative.positions.html> (Nov. 6, 2001).

71. The following commentators have argued that the traditional hearsay exceptions are inadequate for prosecutions of domestic violence: Beloof & Shapiro, *supra* note 9, at 6-10 (arguing that traditional exceptions are not broad enough); Hudders, *supra* note 9, at 1052-59 (arguing that expansion of traditional hearsay exceptions in domestic violence cases is objectionable because of implications for other cases and concluding that a new hearsay exception would be appropriate). On the other hand, the following authors have noted that the traditional hearsay exceptions have been stretched in certain jurisdictions to allow the liberal admission of out-of-court statements in prosecutions of domestic violence. Gersten, *supra* note 10, at 65-66 (noting "creative application of hearsay exceptions" in domestic violence cases across the nation); Brooks Holland, *Using Excited Utterances to Prosecute Domestic Violence in New York: The Door Opens Wide, or Just a Crack?*, 8 CARDOZO WOMEN'S L.J. 171, 172-73 (2002) (arguing that excited utterance exception can be used expansively in cases involving domestic violence); Siegel, *supra* note 10, at 1243, 1275-76 (same).

72. FED. R. EVID. 803(2).

73. FED. R. EVID. 803(4).

74. FED. R. EVID. 807.

75. FED. R. EVID. 801(d)(1)(A). Strictly speaking, this rule does not set forth a hearsay exception, but an exclusion from the definition of hearsay.

76. See *supra* note 68. Beloof & Shapiro, *supra* note 9, at 3, cited this problem as the principal justification for a new hearsay exception in domestic violence cases.

Non-cooperation by recantation or failure to appear at trial is an epidemic in domestic violence cases. Persons qualified to give expert testimony at trial on domestic violence, including psychologists, counselors, police detectives, directors of battered women's shelters, and victim advocates, consistently testify that, in their experience, it is commonplace for domestic violence victims to recant or minimize initial reports of abuse. The head of the Family Violence Division of the Los Angeles District Attorney's Office estimates that ninety percent of domestic violence victims recant. A psychologist specializing in the treatment of battered women has estimated the non-cooperation rate to be eighty percent. Similarly, one judge reports that in as many as eighty percent of domestic violence prosecutions the victim refuses to cooperate at trial. Increasingly, courts have taken judicial notice of the unreliability of the domestic violence victim's recantations. Thus, recantation is the norm rather than the exception in domestic

victim's hearsay statement shortly after the incident.⁷⁷

Among the new state hearsay exceptions for adult victims of domestic violence, Oregon's Rule 803(26) is the most expansive.⁷⁸ This rule allows the admission of out-of-court statements made by the victim within 24 hours of the incident. It is not necessary for the prosecution to show that the victim was "excited" at the time of the statements. Instead, Oregon's Rule 803(26) imposes two requirements. First, the statement must have been made under specified circumstances: the victim must have given an oral statement to a police officer

violence cases. This is hardly surprising. Batterers put hydraulic pressures on domestic violence victims to recant, drop the case, or fail to appear at trial.

Id. (citations omitted).

77. *See id.* at 1 ("[T]he [traditional] hearsay rule promotes the failure of the criminal case by excluding the initial report of abuse. As the hearsay rule excludes out of court statements of abuse, recantation or no-show by the victim results in no charge, dismissal, or acquittal."). *See also* Hudders, *supra* note 9, at 1060-61.

Although the victim, immediately after the incident, may make statements to police investigators or others about what has happened, she is often unavailable, or unwilling, to testify at trial. Thus, her story is often left untold. In many situations, the prosecution of domestic violence cases can only be effective if the hearsay statements of the victim are admissible at trial. A new hearsay exception, covering these situations would allow the full story to be told.

Id. (citations omitted).

78. OR. EVID. CODE 803(26) (West 2002) provides in pertinent part
The following statements are not excluded by [OR. EVID. CODE 803], even though the declarant is available as a witness:

26(a) A statement that purports to narrate, describe, report or explain an incident of domestic violence, as defined in ORS 135.230, made by a victim of the domestic violence within 24 hours after the incident occurred, if the statement:

(A) was recorded, either electronically or in writing, or was made to a peace officer as defined in ORS 161.015, corrections officer, youth correction officer, parole and probation officer, emergency medical technician or firefighter; and

(B) Has sufficient indicia of reliability.

(b) In determining whether a statement has sufficient indicia of reliability under paragraph (a) of this subsection, the court shall consider all circumstances surrounding the statement. The court may consider, but is not limited to, the following factors in determining whether a statement has sufficient indicia of reliability:

(A) The personal knowledge of the declarant.

(B) Whether the statement is corroborated by evidence other than statements that are subject to admission only pursuant to this subsection.

(C) The timing of the statement.

(D) Whether the statement was elicited by leading questions.

(E) Subsequent statements by the declarant. Recantation by a declarant is not sufficient reason for denying admission of a statement under this subsection in the absence of other factors indicating unreliability.

or similar authority, or the victim must have recorded the statement in writing or electronically.⁷⁹ Second, the statement must have sufficient indicia of reliability, based on considerations such as the declarant's personal knowledge, the availability of corroborating evidence, the timing of the statement, the manner of questioning that elicited the statement, and the inconsistency of other statements by the same victim (although recantation is not dispositive).

During the hearings on Oregon House Bill 3395 (which was ultimately codified as Oregon's Rule 803(26)), Joel Shapiro, the principal author of the bill, offered this explanation of its purpose:

[T]he bill recognizes that recantation by victims of domestic violence is commonplace. This phenomenon is typically motivated by reasons unrelated to the veracity of the initial report [of abuse]. By admitting at trial the statements of domestic violence victims covered by HB 3395, Oregon will be better able to protect the women and children of this state by successfully prosecuting domestic assailants.⁸⁰

House Bill 3395 also drew criticism from some legislators and criminal justice experts on the following grounds, among others: 1) there was no showing that the existing residuary hearsay exception was inadequate in Oregon;⁸¹ 2) the new hearsay exception might lead to the admission of false statements that the declarant could not recant;⁸² 3) the new law would limit the confrontation rights

79. If the victim recorded the statement in writing or electronically, it is not necessary that she actually presented the statement to a police officer or similar authority. OR. EVID. CODE § 803(26)(a)(A) (West 2002); LAIRD C. KIRKPATRICK, OREGON EVIDENCE § 803.28[3] (2002) (questioning the wisdom of imputing the same reliability to a victim's written statements as to the victim's statements to law enforcement officers) ("An official report to police (which could subject the complainant to liability if fabricated) would be far more reliable than a personally recorded note (made within 24 hours but perhaps not brought to the attention of the police until much later.>"). The language in OR. EVID. CODE 803(26)(a)(A) appears to derive from CAL. EVID. CODE § 1370 (2002) (California's hearsay exception for physical abuse cases), which provides in subsection (a)(5) that the statement is inadmissible unless it "was made in writing, was electronically recorded, or made to a physician, nurse, paramedic, or to a law enforcement official." The Michigan Legislature has considered, but not yet adopted, a proposal with a requirement similar to OR. EVID. CODE 803(26)(a)(A). That bill, HB 4765, would admit a hearsay statement by a domestic violence victim if the statement "was made in writing, was electronically recorded, or was made to a law enforcement official." More information about this bill is available at the website from the Michigan State Bar, <http://www.michbar.org/legislative.positions.htm> (last visited Jan. 30, 2003) (the Michigan State Bar supports in principle HB 4765).

80. Hearing on H.B. 3395 Before the House Judiciary Comm. on Criminal Law, 1999 Leg., 70th Sess. (Or. 1999) (written testimony of Joel Shapiro (exhibit U, law student, Northwestern School of Law and Clark College)), *quoted in* Dworkin, *supra* note 10, at 304.

81. Dworkin, *supra* note 10, at 304-05 (citing testimony of Ingrid Swenson, Oregon Criminal Defense Lawyer's Association, at Apr. 23, 1999 hearing).

82. *Id.* (citing testimony of Kathie Osborne, Oregon Juvenile Rights Project, at Apr. 23, 1999 hearing).

of defendants;⁸³ and 4) the law would facilitate the “mandatory prosecution policy” in domestic violence cases, which some commentators believe is objectionable.⁸⁴

Recent scholarship has suggested that Oregon’s Rule 803(26)—or a similar hearsay exception for domestic violence cases—would be a salutary addition to the Federal Rules of Evidence.⁸⁵ Yet there are many reasons why this rule would be inappropriate for the federal system. First, it is doubtful that federal law enforcement agents could take advantage of Oregon’s unique exception due to the temporal restrictions in that rule. Virtually all federal prosecutions of violence against women arise from investigations that are begun by local officers, not federal officers. A federal law enforcement agency typically does not receive a referral until the case is several days old. The local officers who investigate domestic violence cases know that the vast majority of such cases will be prosecuted in state court under traditional state hearsay rules, so these officers generally follow state protocols in their investigations. Because 47 states have not adopted a hearsay exception along the lines of Oregon’s Rule 803(26), the normal investigative protocol in these states often will not suit the particular requirements of this rule, and it is unlikely that federal agents will have a chance to take a qualifying statement within the first 24 hours after the incident.

A second reason why Oregon’s Rule 803(26) would be less useful in federal court than in state court is the distinctive nature of the statutes under which violence against women is prosecuted in federal court. Prosecutors enforcing these federal laws need not rely as heavily on the victim’s hearsay statements as do state prosecutors enforcing the traditional domestic violence laws. Approximately half of the federal VAWA cases are brought under 18 U.S.C. § 922(g)(8) (which prohibits possession of a firearm by a person against whom a restraining order is pending) and 18 U.S.C. § 922(g)(9) (which prohibits possession of a firearm by a person who has been convicted of a misdemeanor

83. *Id.* at 306 (citing comments of Senator Neal Bryant, Chair, Senate Judiciary Committee, at June 16, 1999 hearing).

84. *See* Beloof & Shapiro, *supra* note 9, at 31-36 (summarizing debate over mandatory prosecution policies). *But cf.* Hanna, *supra* note 68, at 1909 (defending mandatory prosecution policies on the ground that they vindicate society’s overall interest in curbing violence, even if individual victims are reluctant to cooperate). *Also cf.* Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550 (2000) (suggesting that mandatory prosecution is harmful to victims and is an affront to their autonomy).

85. Beloof & Shapiro, *supra* note 9, at 14 (suggesting that FRE 803 be amended to admit out-of-court statements by a victim to police or other similar officials within twenty-four hours of alleged domestic violence, following OR. EVID. CODE § 803(26)); *see also* Hudders, *supra* note 9, at 1060 (arguing that after Congress has created special evidentiary rules for prosecution of sexual assault and child molestation, a new hearsay exception for domestic violence cases would be appropriate); *see also* Donna M. Matthews, *Making the Crucial Connection: A Proposed Threat Hearsay Exception*, 27 GOLDEN GATE U. L. REV. 117, 160-64 (1997) (urging that FRE 804 be amended to admit out-of-court statement by deceased victim of domestic violence).

crime involving domestic violence).⁸⁶ The act at issue in these cases is the defendant's possession of a firearm, which usually can be established without relying on the hearsay statement of an abused partner.⁸⁷ In addition, a substantial number of federal cases involving violence against women are rape cases arising in Indian Country.⁸⁸ Given modern technology, rape cases are not so dependent on a victim's hearsay statements: the presence of the defendant's bodily fluid or other biological evidence on the victim's person, coupled with bruises or other evidence that the victim withheld consent, would be a strong basis on which to prosecute a rape case even without the admission of the victim's hearsay statements. By contrast, a typical prosecution of domestic violence in state court depends more heavily on hearsay statements, either because the offender's identity is not readily apparent from the physical evidence, or because the offender may try to ascribe the defendant's injuries to a fall or some other "innocent" case.⁸⁹ Even in federal cases where hearsay statements would be just as important as in state cases, federal investigators have far greater investigative resources and are better able to find alternative evidence if hearsay cannot be admitted.

Third, it appears that hearsay is already admitted liberally in federal prosecutions of violence against women. The exception for excited utterances is used extensively in federal cases,⁹⁰ as is the exception for statements in aid of

86. See *supra* note 4 (showing that in the last few years, approximately half of the VAWA cases filed by federal prosecutors have involved firearms charges under 18 U.S.C. §§ 922(g)(8) and 922(g)(9)).

87. See, e.g., *United States v. Smith*, 964 F. Supp. 286 (N.D. Ia. 1997) (prosecuting the first case in the country under 18 U.S.C. § 922(g)(9) without heavy reliance on assistance from the defendant's reluctant girlfriend). I will describe this case in more detail in the introduction of an article entitled *A Better Way to Disarm Batters*, forthcoming in March 2003 issue of the *Hastings Law Journal*.

88. See *supra* note 5 and accompanying text.

89. Even the small number of prosecutions brought under VAWA statutes that are somewhat analogous to state domestic violence statutes (e.g., 18 U.S.C. § 2262 (1994), which prohibits crossing state lines to violate a restraining order) will not rise and fall based on the admissibility of the victims' hearsay statements. The defendant's act of crossing state lines, and his motive for doing so, is likely to be a more significant piece of the puzzle than is the victim's out-of-court statements.

90. FED. R. EVID. 803(2). In cases involving domestic violence, federal courts have permitted a fairly long interim period between the violent act and the declarant's statement. *United States v. Hefferon*, 314 F.3d 211 (5th Cir. 2002) (two-hour delay permissible in sexual assault case involving minor victim); *United States v. King*, No. 99-2363, slip op., at *4-5 (10th Cir. July 26, 2000) (seven-hour delay permissible in rape case involving minor victim); *United States v. Cruz*, 156 F.3d 22, 30 (1st Cir. 1998) (statement by battered woman four hours after beating was excited utterance); *Morgan v. Foretich*, 846 F.2d 941, 947 (4th Cir. 1998) (statement by minor victim admissible even though it was made three hours after departure from abusive father's home); *United States v. Farley*, 992 F.2d 1122, 1123 (10th Cir. 1993) (excited utterance exception applied to statement by minor one day after alleged molestation); see also *United States v. Tocco*, 135 F.3d 116, 127-28 (2d Cir.

medical treatment,⁹¹ the exception for prior inconsistent statements,⁹² and the residual hearsay exception.⁹³ The fact that the U.S. Department of Justice has not sought a new hearsay exception is telling: existing hearsay exceptions are sufficient to keep the acquittal rate at approximately 1-2% in VAWA cases.⁹⁴

There is a fourth reason why Oregon's Rule 803(26) should not be adopted in the federal courts. This rule would be theoretically inconsistent with the other rules in the Federal Rules of Evidence. Indeed, it appears that Oregon's Rule 803(26) is grounded in expediency rather than sound evidentiary theory. Proponents of the rule emphasized the practical necessity for the new exception, rather than the reliability of the evidence it would admit.⁹⁵ There was little attempt to show the inherent trustworthiness of this subcategory of evidence.

1998) (three-hour delay did not thwart application of excited utterance exception to statement by adult declarant); *Webb v. Lane*, 922 F.2d 390, 395 (7th Cir. 1991) (victim of shooting gave statement two hours after incident).

91. FED. R. EVID. 803(4). In sexual abuse cases, many federal courts have held that statements to physicians by child victims identifying their abusers are "reasonably pertinent to diagnosis or treatment" because the physicians cannot adequately treat these patients without knowing the extent of their emotional and psychological injuries, and without knowing whether these victims can safely be returned to their homes. *United States v. Yellow*, 18 F.3d 1438, 1442 (8th Cir. 1994); *see also* *United States v. Joe*, 8 F.3d 1488, 1494 (10th Cir. 1993); *United States v. Belfany*, 965 F.2d 575, 579 (8th Cir. 1992); *United States v. George*, 960 F.3d 97, 99-100 (9th Cir. 1992); *Morgan*, 846 F.3d at 949. Some courts have extended this reasoning to statements by adult victims of domestic violence. As the Tenth Circuit reasoned in *Joe*, "the domestic sexual abuser's identity is admissible under Rule 803(4) where the abuser has such an intimate relationship with the victim that the abuser's identity becomes 'reasonably pertinent' to the victim's proper treatment." *Joe*, 8 F.3d at 1495 (admitting statement of adult victim).

92. FED. R. EVID. 801(d)(1)(A). As noted previously, this rule is not an "exception" to the hearsay rule, but rather an exclusion of certain evidence from the definition of hearsay. This rule is invoked occasionally in federal prosecutions of violence against women. For example, in *United States v. Young*, 316 F.3d 649, 659 (7th Cir. 2002), the defendant was charged with interstate travel to commit domestic violence, and the victim testified about the crime before the grand jury. By the time of trial, she had recanted her testimony and was a "turncoat witness." *Id.* The district court allowed the prosecution to impeach the witness with her testimony before the grand jury pursuant to FRE 801(d)(1)(A), and the Seventh Circuit upheld this ruling. *Id.* at 660.

93. FED. R. EVID. 807. *E.g.*, *United States v. Harrison*, 296 F.3d 994, 1004 (10th Cir. 2002) (admitting statements of child victim regarding abuse that occurred many years before under FRE 807); *United States v. McKinney*, No. 98-30250 slip op., at *2-3 (9th Cir. July 14, 1999) (admitting under FRE 807 statements by adult victim of domestic violence that occurred four or five hours before statements); *see* 2 JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES § 7.49, at 319 (3d ed. 1997) ("courts regularly employ the residual exception in child abuse litigation").

94. *See* Executive Office of U.S. Attorneys fax, *supra* note 40 (well over 100 VAWA cases are filed per year, but only an average of two defendants per year are acquitted in these prosecutions).

95. *See supra* note 80 and accompanying text.

The new exception seems most akin to the excited utterance rule, and is, in effect, a *per se* rule of excitement, treating virtually all statements by a victim of domestic violence as excited utterances if the statements are made within 24 hours of the incident.⁹⁶ Like the excited utterance rule, Oregon's Rule 803(26) seems to rest on the theory that declarants are more likely to tell the truth when they are excited, because they have less opportunity for the detached reflection that is necessary for fabrication. Yet Oregon's Rule 803(26) permits not only the admission of oral statements, but also statements that the declarant has recorded electronically or in writing. This latter provision is perplexing in that the act of recording a statement suggests the declarant's excitement has dissipated, and the declarant is now calm enough to write down her thoughts, a circumstance that erodes the primary theoretical basis for the new hearsay exception. The credence that Oregon Rule 803(26) accords to a declarant's writings in a private setting finds no precedent in the current Federal Rules of Evidence.⁹⁷ At bottom, the justification for Oregon's Rule 803(26) lies not in its fealty to time-honored principles in the rules of evidence, but rather in the belief that domestic violence cases are urgently important and the prosecution's burden should be eased in this subset of cases. Some commentators seem willing to look past the theoretical inconsistencies for the sake of expediency,⁹⁸ but this approach has led to unduly politicized rulemaking in the past,⁹⁹ and the long-term effect of such a strategy could be to compromise the integrity of the rules.

Perhaps the most significant hurdle for the proponents of the new hearsay exception is the Confrontation Clause of the Sixth Amendment.¹⁰⁰ While the Sixth Amendment poses virtually no impediment for "firmly rooted" hearsay

96. During the hearings on HB 3395, this bill was promoted as an "expansion" of the excited utterance exception. Dworkin, *supra* note 10, at 307.

97. See, e.g., FED. R. EVID. 612 (prior writings by testifying witness can be used to refresh memory but must then be withdrawn before testimony resumes); FED. R. EVID. 803(4) (prior writings by witness can be used as evidence only when witness has exhausted memory on the stand, and threshold requirements are met to establish reliability of writing; even then, writing can only be read to jury, not submitted as an exhibit). Professor Kirkpatrick has suggested that the great credence accorded to writings under Oregon's Rule 803(26) may be misplaced. See MUELLER & KIRKPATRICK, *supra* note 12.

98. E.g., Hudders, *supra* note 9, at 1060 ("[E]ven though a proposed hearsay exception for domestic violence is driven by policy and does not fit fully within the evidence rules' theoretical framework, it would be a suitable candidate for legislative action.").

99. Examples of highly politicized rules of evidence include FRE 413 (admitting propensity evidence in prosecutions of sexual assault), FRE 414 (admitting propensity evidence in prosecutions of child molestation), and FRE 704(b) (the so-called "Hinkley Rule," prohibiting experts from opinion as to whether a criminal defendant could form the mens rea necessary to commit the charge offense). For a further discussion of the "politicization" of the FRE, see Capra, *supra* note 7.

100. The Sixth Amendment to the U.S. Constitution provides, in pertinent part, as follows: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him" U.S. CONST. amend. VI.

exceptions,¹⁰¹ a new federal version of Oregon's Rule 803(26) would probably not qualify as "firmly rooted."¹⁰² As a consequence, the admission of hearsay under this exception would need to withstand scrutiny under the Supreme Court's rulings interpreting the Confrontation Clause in criminal prosecutions. The government would need to show that the hearsay declarant has been subject to cross-examination by the defendant,¹⁰³ or that the declarant is unavailable for cross-examination.¹⁰⁴ In addition, the government would need to show that the evidence admitted under the new hearsay exception is sufficiently reliable.¹⁰⁵ The difficulty of satisfying these confrontation requirements would vary with each case, but for the reasons discussed above,¹⁰⁶ the reliability of evidence that meets the requirements of Oregon's Rule 803(26) should not be taken for granted, and a federal version of this rule might run afoul of the Confrontation Clause on a number of occasions.¹⁰⁷

101. In a series of cases—most notably *White v. Illinois*, 502 U.S. 346 (1992), *Bourjaily v. United States*, 483 U.S. 171 (1987), and *United States v. Inadi*, 475 U.S. 387 (1985)—the Supreme Court has ruled that a firmly rooted hearsay exception ensures the reliability of evidence admitted under the exception, and diminishes the need for cross-examination of the hearsay declarant.

102. In *Idaho v. Wright*, 497 U.S. 805 (1990), the Supreme Court considered whether Idaho's residual hearsay exception was "firmly rooted." The Court held that a hearsay exception is not firmly rooted if it lacks "the imprimatur of longstanding judicial and legislative experience." Idaho's residual hearsay exception could not be considered firmly rooted because "hearsay statements admitted under the residual exception, almost by definition, . . . do not share the same tradition of reliability that supports the admissibility of statements under a firmly rooted hearsay exception." *Id.* at 817.

103. In *United States v. Owens*, 484 U.S. 554 (1988), and *California v. Green*, 339 U.S. 149 (1970), the U.S. Supreme Court made clear that the federal confrontation requirements are satisfied when the hearsay declarant is actually subject to cross-examination by the defendant.

104. The Confrontation Clause does not require that the hearsay declarant be subject to cross-examination where the government shows the declarant is actually unavailable despite the government's good faith efforts to secure the declarant's testimony. *Ohio v. Roberts*, 448 U.S. 561 (1980); *Mancusi v. Stubbs*, 408 U.S. 204 (1972); *Barber v. Page*, 390 U.S. 719 (1968).

105. The government must show that the evidence has "particularized guarantees of trustworthiness," i.e., circumstances "that surround the making of the statement and that render the declarant particularly worthy of belief." *Idaho v. Wright*, 497 U.S. 805 (1990).

106. See *supra* notes 96-97 and accompanying text.

107. For example, in *State v. Moore*, 334 Or. 328 (2002), the Oregon Supreme Court found that Oregon's own confrontation clause required the exclusion of a hearsay statement by a domestic violence victim. Oregon has chosen not to follow the U.S. Supreme Court's confrontation cases subsequent to *Ohio v. Roberts*, so Oregon still requires the government to prove that a hearsay declarant is actually available for cross-examination or is unavailable for permissible reasons. 334 Or. at 335-40. Oregon imposes this requirement for all hearsay exceptions, whether or not they are "firmly rooted." *Id.* In *Moore*, the Oregon Supreme Court considered whether the trial court had properly admitted an excited utterance by a domestic violence victim who was not present during the defendant's trial, and whose unavailability had not been demonstrated by the prosecution. The Oregon Supreme Court held that admission of such a statement violated the defendant's

CONCLUSION

This short essay has studied three innovative approaches taken by states to facilitate the admission of certain evidence that is useful in the prosecution of domestic violence. These approaches may make sense under the circumstances presented in state court, but they should not be imported into the Federal Rules of Evidence. In the federal system, such rules would cause theoretical inconsistencies, would cause undue prejudice to defendants, would impose burdens on victims of domestic violence, and would create double standards for Native Americans. The practical need for these reforms is dubious, because federal prosecutors are already achieving high conviction rates in cases involving violence against women. Reform of the federal evidentiary rules to assist prosecutions of domestic violence may be politically popular, but in reality, it's a solution in search of a problem.

The conclusion of this article should not be construed as a criticism of the attorneys who authored the three primary pieces of legislation reviewed herein.¹⁰⁸ One cannot help but admire these attorneys' commitment to eradicating domestic violence, and their careful approach to crafting legislation that addresses the unique needs of their states. The purpose of the present article is not to criticize these pathbreaking approaches in state court, but rather to urge caution in adopting such approaches in federal court.

confrontation rights, even though the statement was otherwise admissible under Oregon's hearsay exception for excited utterances. *Id.* at 341. Similar analysis would be likely in federal court if the new hearsay exception were not deemed to be "firmly rooted."

108. One common denominator of the three principal statutes examined in this article, OR. EVID. CODE § 609(2); CAL. EVID. CODE § 1109, and OR. EVID. CODE § 803(26), is that they were drafted in large part by recently admitted (or not-yet-admitted) lawyers. Gina Skinner authored Oregon House Bill 3680 (later codified as OR. EVID. CODE § 609(2)) within four years of her admission to the Oregon State Bar, according to biographical data available at www.martindale.com. Lisa Marie De Sanctis co-wrote Senate Bill 1876 (codified as CAL. EVID. CODE § 1109) one year after graduating from law school. Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 359 n.44 (1996). Joel Shapiro wrote Oregon House Bill 3395 (later codified as OR. EVID. CODE § 803(26)) while he was a third-year law student. See Peter R. Dworkin, *Confronting Your Abuser in Oregon: A New Domestic Violence Hearsay Exception*, 37 WILLAMETTE L. REV. 299, 304 (2001).

THE JUDGE HAS NO ROBES: KEEPING THE ELECTORATE IN THE DARK ABOUT WHAT JUDGES THINK ABOUT THE ISSUES

ALAN B. MORRISON*

On June 27, 2002, the Supreme Court ruled in *Republican Party of Minnesota v. White*¹ that state rules that forbid candidates for elected judicial office from “announcing” their views on “disputed legal and political issues” that might come before them as judges, violate the First Amendment. The 5-4 decision, written by Justice Antonin Scalia, and joined by the four other “conservative” justices, will mean that similar restrictions in twenty-six of the thirty-one states that elect some or all of their judges must be reconsidered.² Some see the decision as a frontal attack on the judicial system, much the same way that the High Court’s 5-4 decision in *Bates v. State Bar of Arizona*,³ holding that blanket bans on lawyer advertising violated the First Amendment, was viewed a quarter of a century ago.⁴

Although *White* is a First Amendment case, and I agree with the majority’s conclusion, this essay will discuss the question of the advisability of restrictions on the speech of candidates for judicial office as if the vote had gone the other way and the issue was to be decided as a matter of policy, not constitutional law. My thesis is that, in addition to the First Amendment flaws identified by the *White* majority, states should relax restrictions on judicial candidates’ speech because the benefits that flow from the public knowing more about a candidate’s views on issues, especially for a state’s highest court, far outweigh the possible negative effects of permitting those views to be expressed during an election campaign. In addition, states should get out of the business of “enforcing” whatever rules they have governing judicial elections. That function should be transferred to a non-governmental entity that would have the power to issue public advisory opinions on whether judicial candidates were complying with the

* Director, Public Citizen Litigation Group, Washington D.C. Most of the work for this essay was done while the author was the Irvine Visiting Fellow at Stanford Law School. The essay could not have been completed without the tireless and resourceful research assistance of Jeremiah Frei-Pearson, Stanford Law School, Class of 2003. The always-useful comments of David Vladeck and Allison Zieve of the Public Citizen Litigation Group also improved the essay; any remaining defects are the responsibility of the author.

1. 122 S. Ct. 2528 (2002). The author was co-counsel on an amicus brief submitted in support of the petitioners in *White*.

2. *See id.*

3. 433 U.S. 350 (1977).

4. The brief of the Minnesota State Bar at 25-28, quoted by Justice Ginsburg in her dissent, 122 S. Ct. at 2558 n.5, predicted that “the entire fabric of Minnesota’s non[p]artisan elections hangs by the Announce clause thread,” just as the dissenters in *Bates* claimed that *Bates* would produce “profound changes in the practice of law.” 433 U.S. at 386. It is more than a little ironic that Justice Stevens, who was in the majority in *Bates*, dissented in *White*, and the only other Justice who sat in both cases, now Chief Justice Rehnquist, dissented on the First Amendment issue in *Bates*, and shifted to the other side of the First Amendment controversy in *White*.

applicable rules, but it could not impose any formal sanctions. This approach would be a partial answer to the intractable problem of line-drawing, and it would allow states to have rules of the kind that were set aside in *White*, so long as the state did not penalize anyone for violating them.⁵

I. WHY HAVE A JUDICIAL ELECTION—AND WHY NOT

Although *White* involved an election to an appellate court, the vast majority of elected judges in the United States are trial court judges.⁶ As Paul Carrington has pointed out, the rationale for electing trial judges is quite different from that for electing appellate judges; moreover, there are important differences between state intermediate courts and state supreme courts that might affect a state's decision on whether to elect or appoint the members of the two types of courts.⁷ Whatever the rationales, elections do happen regularly, and states try to regulate what candidates can and cannot say during the election races.

Another important fact about judicial elections is that judges often leave the bench during their term of office, and many states permit the governor to fill a vacancy until the next election.⁸ This is often seen as giving incumbents advantages, but it also means that they will have actual judicial records that can be examined at election time. The result is that, like many other elections, judicial races generally involve an incumbent running against a challenger, although it is quite common for the incumbent to be running in a judicial election for the first time.⁹

The federal system of selecting judges—Presidential nomination and Senate

5. A National Symposium on Judicial Campaign Conduct and the First Amendment, organized by the National Center for State Courts, was held on November 9-10, 2001, before the Supreme Court had granted review in *White*. The short summary of the major lessons from the symposium, together with the papers presented at it, have been published by the Indiana University School of Law—Indianapolis, beginning at 35 IND. L. REV. 649 (2002). Some of them support the positions taken here, while others oppose them, but in the interest of limiting citations, this essay will not refer to those papers simply to confirm that another author agreed or disagreed with the points made here. For those interested in the topic, the symposium papers are worth reading, in part because they cover topics not discussed in this essay.

6. Approximately eighty-seven percent of state trial judges must run for some type of election, while eighty-two percent of state appellate judges must run for election. See Elizabeth A. Larkin, *Judicial Selection Methods: Judicial Independence and Popular Democracy*, 79 DENV. U. L. REV. 65, 76 (2001).

7. See Paul D. Carrington, *Judicial Independence and Democratic Accountability in the Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 87 (1998).

8. See, e.g., American Judicature Society, *Judicial Selection Methods in the States*, at http://www.ajs.org/selection/sel_state-select-map.asp [hereinafter Judicial Selection Chart] (last modified Oct. 2002).

9. But see Lawrence H. Averill, Jr., *Observations on the Wyoming Experience with Merit Selection of Judges: A Model for Arkansas*, 17 U. ARK. LITTLE ROCK. L.J. 281, 299-300 (1995) (noting that incumbent judges are likely to run unopposed).

confirmation—is the exception, although a number of states nominate and confirm some of their judges.¹⁰ On the surface, the differences between an elected and appointed process seem very significant to the issues raised by *White*, but there are substantial reasons to be concerned about the same problems of prejudgment that formed the heart of the dissent in *White*, no matter how the judge is chosen. Those problems have been largely submerged, and this essay will only mention them briefly.¹¹

The first question that should be, but rarely is, asked about judicial elections is, why have them in the first place? At one level, the answer is quite clear: elections were preferred to appointments because citizens wanted more accountability in their judges, and elections were a ready means of obtaining it.¹² The next question, on which the answer is much less clear, is what those elections are supposed to be about? Again, on one level there is agreement: the candidate should be competent, honest, have judicial temperament and the experience required for the position.¹³ The trouble with those qualifications is that in most cases they are not very helpful in choosing among the candidates.

Consider competence. Obviously, if one candidate was admitted to practice three years ago, and the other had thirty years of experience, that would be of considerable significance, but it would also be extremely rare to find such disparities. In the much more common situation, both candidates have had substantial legal careers, and there are no obvious benchmarks that favor one or the other. Thus, even lawyers might have difficulty deciding which candidate is better qualified, and that assumes that there is agreement on how much familiarity a candidate should have with the particular court and/or areas of law under its jurisdiction. To be sure, lawyers vying for the position of probate judge should have a background in that field, but most courts are courts of general jurisdiction, including both civil and criminal dockets, and many, if not most, litigators tend to work in one area to the exclusive of the other. While most trial judges have had substantial litigation experience, that is not always the case, and for appellate judges, prior litigation experience is even less obviously a pre-

10. See Judicial Selection Chart, *supra* note 8.

11. See *infra* notes 54, 85 and accompanying text.

12. Historically, state judicial elections were implemented to give citizens democratic control over the judiciary—an institution that was often perceived as anti-democratic and unresponsive to the interests of average citizens. See, e.g., Samuel Latham Grimes, “Without Favor or Delay”: Will North Carolina Finally Adopt the Merit Selection of Judges?, 76 N.C. L. REV. 2266, 2272-73 (1998) (citing ALLAN ASHMAN & JAMES J. ALFINI, THE KEY TO JUDICIAL MERIT SELECTION: THE NOMINATING PROCESS 9 (1974)); see also Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 979 (2001) (implying that judicial elections were originally motivated by “judicial accountability and public participation—the Jacksonian populist era ideals”); Kelly Armitage, *Denial Ain’t Just a River in Egypt: A Thorough Review of Judicial Elections, Merit Selection and the Role of State Judges in Society*, 29 CAP. U. L. REV. 625 (2002).

13. Respondents in *White* included as relevant factors “a candidate’s ‘character,’ ‘education,’ ‘work habits’ and ‘how [he] would handle administrative duties if elected.’” 122 S. Ct. at 2534 (quoting Brief for Respondent at 35-36).

requisite. Based on my completely unscientific and unrecorded survey of my own personal experiences, I have encountered some very good and some very mediocre judges, for which there is no obvious correlation between their ability on the bench and the extent of their prior litigation practice.¹⁴

Nor are issues related to honesty or judicial temperament likely to shed much light on an election race. The problem is not that there are no dishonest lawyers or judges, or that some judges are ill suited to serve in a fair and impartial manner; rather, it is that these traits are almost never revealed until it is too late. Of course, if a sitting judge has a consistent bias in his or her rulings, or is generally nasty in the courtroom to lawyers, witnesses, and jurors, that may be the basis for a negative vote at re-election time, but those traits are rarely revealed until a person dons judicial robes.

One way to ask why we have judicial elections is to examine what is agreed such elections should *not* be about. Unlike races for positions such as governor, attorney general, or legislator, those running for a judgeship are not expected to have platforms that they promise to deliver to the voters if elected. Such promises are often broken by those chosen for the executive and legislative branches,¹⁵ but the rules are clear—and they were not challenged in *White*—that candidates for judicial office may not make pledges or promises with respect to cases or issues that may come before them if elected.¹⁶ In Part II, this article will examine the reasons behind what I will refer to as the “no pledge” rule as a means of understanding why other rules, such as the “no announce” rule struck down in *White*, are unwise, or at least too broad, in part for the reasons stated and/or intimated at in that decision.

Briefly stated, my argument is as follows: no announce rules are largely fig leaves because their coverage is extremely limited, and hence they do very little to protect the public from electing judges who are in fact biased or have pre-commitments on some key issues that will come before them.¹⁷ The rules are also much too broad since they deny the electorate valuable information that is and should be directly relevant to voters in deciding which judicial candidate to support.¹⁸ Because, as currently written, those rules give very little protection at the very high cost of denying relevant information, the substantive standards governing what candidates may and may not say should be changed. Finally, the current means of state enforcement of the rules governing speech by judicial candidates is fraught with problems, regardless of the substantive rules governing

14. Once, during a private conversation with the author, a judge who was then sitting in the United States District Court for the District of Columbia commented negatively on the lack of prior trial experience of the judges of the Court of Appeals for the D.C. Circuit, referring to them as “a bunch of school teachers,” even though only a few of them had come to the court directly from law teaching.

15. Justice Scalia referred to campaign promises generally as “by long democratic tradition—the least binding form of human commitment.” 122 S. Ct. at 2537.

16. See Minn. Canon 5(A)(3)(d)(I) (2002).

17. See discussion *infra* Part III.

18. See discussion *infra* Part IV.

judicial election speech, and therefore the state enforcement mechanism should be replaced by a private body, with only moral and not legal authority, as the preferred means of reigning in inappropriate speech in judicial elections.¹⁹

II. JUDGES SHOULD BE IMPARTIAL

In deciding what qualities judges should have, the terms “independence” and “impartiality” are often linked together as desirable, if not necessary, traits.²⁰ In the context of judicial elections, lack of independence—for example, through control by some other person—does not appear to be a serious problem. The issue of independence often refers to freedom from control by another branch of government, as exemplified by such provisions in the U.S. Constitution as Article III, which gives judges life tenure during good behavior and prohibits salary reductions,²¹ and the Speech or Debate Clause in Article I, which precludes review in any other forum of statements made by members of Congress in their legislative work.²² Independence also has been used to describe whether a person serving in the executive branch is removable at will or only for cause.²³ But none of those usages would accurately describe the impact on a judge of the fact that she or he was elected to that office rather than appointed. Perhaps lack of independence is the right term to apply to a judge who has had to raise substantial amounts of money to finance his election, and if the money came from those with an interest in the results of the court on which the judge will be serving, especially if the judge has some inclination to run again. The independence, or at least the impartiality of such a judge, might well be questioned, but none of the speech control rules applicable to judicial elections is directed at that problem.²⁴

19. See discussion *infra* Part V. The plaintiffs in *White* also challenged the Minnesota rule that, in essence, requires judicial candidates to stay completely clear of political parties, but the Court of Appeals rejected that claim and the Supreme Court declined to hear it. See *Republican Party of Minn. v. Kelly*, 247 F.3d 854 (8th Cir.), *cert. granted*, 534 U.S. 1054 (2001). This essay will discuss only the no pledge and no announce rules, but the analysis would apply to other speech-controlling rules, and the proposal for ending state enforcement in this area would cover all of these rules, not just those discussed in this essay.

20. See, e.g., Brief of Amicus Curiae American Bar Association at 12, *Republican Party of Minn. v. White*, 122 S. Ct. 2528 (2002) (No. 01-521) (arguing that states have a “compelling interest in maintaining judicial independence and impartiality”).

21. U.S. CONST. art. III.

22. U.S. CONST. art. I, § 6, cl. 1.

23. See Alan B. Morrison, *How Independent Are Independent Regulatory Agencies*, 1988 DUKE L.J. 252.

24. See *Public Citizen v Bomer*, 274 F.3d 212 (5th Cir. 2002) (discussing the financing of judicial elections and the due process problems caused by the absence of recusal rules and the resulting the appearance of partiality). *But cf.* *Pierce v. Pierce*, 39 P.3d 791 (Okla. 2001) (disqualification required where trial judge’s election was financed to significant degree by counsel for one side); *White*, 122 S. Ct. at 2535, 2538-39 (discussing due process problems that result from

Some may argue that a candidate who is known to support certain positions on issues, such tort reform, the death penalty or constitutional interpretation, either in prior judicial opinions, writings, or public statements made before the election race began, is, for that reason, not independent of the electorate, at least with respect to those issues. Others would describe that situation not as lack of independence, but as one of accountability that is not only inevitable but desirable in a system with judicial elections.²⁵ On that theory, the electorate should be able to rely on judges to do in the future what they say they have done in the past. Similarly, it may be unfortunate if a judge is swayed by public opinion to take one position rather than another, but it cannot reasonably be described as caused by a lack of independence, save perhaps in those jurisdictions where the term of judicial office is very short. Thus, as long as there is no legal authority to remove a judge from office (other than for criminal conduct or something very close to it), the concern is not one of independence, but of something else.

The problem is more appropriately described as one of prejudgment, whether through bias, partiality, general preferences, or any other reason that results in a judge already committing him or herself on a particular issue and therefore being unable to perform the basic function of the office—to judge each case based on the facts and law presented, not on his or her personal views. Why this should be so, and what the ramifications are of this postulate for speech in judicial elections, are explained below. Assuming it is correct, however, it can reasonably support a standard under which a judge would be forbidden to pledge to decide a case a certain way if elected, because that kind of promise or commitment would violate the most fundamental of judicial obligations.

Although no one has challenged the no pledge rule, it is worth considering why there is agreement about it, and why the no pledge rule is worth maintaining. First, ours is an adversary system in which each side makes the best factual and legal arguments in an effort to persuade the decisionmaker (here the judge) on the issues. A judge who has promised to decide an issue one way has, in effect, said “No matter what facts are presented, and no matter what legal arguments are raised (even if I have never considered them before), I will not change my mind.” If any judicial candidate were so ill advised as to make such a statement, and still did not recuse himself from the case in which that issue arose, that would be a denial of the due process right to a neutral decisionmaker guaranteed by the

private financing of judicial elections); *id.* at 2555-58 (Ginsburg, J., dissenting).

25. In the words of Wisconsin Chief Justice Shirley S. Abrahamson:

The people are the sole legitimate source of power. Judges should be accountable to the people because judges make decisions that affect the community. The people should have the power to get rid of bad judges even if the criteria for the removal of judges may be different from the criteria for removing legislators and governors. Citizens should be encouraged to participate as fully as possible in civic life. Electing judges is citizen participation. Elections legitimize the judicial authority.

Abrahamson, *supra* note 12, at 979-80.

Constitution.²⁶ Similar reasons, perhaps not reaching constitutional dimensions, counsel judges not to include too much dicta in their opinions, lest they deny the next party, not represented in the current case, the opportunity to persuade the judge that the position previously taken was not correct.

Second, judges, like others, change their minds, even when strongly disposed to their prior views.²⁷ The most dramatic examples occur when a judge alters his position on a rehearing of the same case, sometimes because facts are called to his attention that he had overlooked before, sometimes because the impact of the initial decision on other situations is called to the judge's attention, and others because, on further reflection, the arguments of the losing side seem more persuasive.²⁸ And even when a judge does not change the basic thrust of a prior ruling, different facts may enable the judge to distinguish the prior case, and new legal arguments may alter the rationale for the decision, which may result in a different application in other circumstances. The extent to which a judge or judicial candidate has firmly staked out a position may determine the willingness or even the practical ability of a judge to make such changes should the opportunity present itself. Some prejudgments of this kind are inevitable in opinion writing because a judge must at least think through the implications of his decision for those cases that will follow it. But there is nothing inevitable in the nature of the campaign process that requires a judicial candidate to make a firm pledge to rule one way or the other on an issue.

Third, sometimes, even when we think we know the views of Supreme Court Justices on particular issues, they fool us. Just this past term, the Chief Justice, who almost always sides with the government in criminal cases, voted with the majority to support a prisoner's habeas corpus claim that the state courts had failed to provide a proper state law justification for avoiding the federal constitutional issues.²⁹ Similarly, Justice Scalia, who also rarely supports criminal defendants and who is known for interpreting the Constitution as it was meant to be read in 1789, wrote the 2001 opinion in which the Court held that a heat-detecting device, used to determine whether indoor lamps were helping a defendant grow marijuana inside his home, violated the Fourth Amendment even though the technology was not invented until two centuries after it was enacted.³⁰ Or in the famous flag-burning case, Justice Stevens, a noted supporter of the First

26. See *Aetna Life Ins. v. Lavoie*, 475 U.S. 813 (1986) (holding that in certain situations judges who are not recused can violate a party's due process right by sitting on a trial where the judge may not be able to be impartial); see also *supra* note 24.

27. Compare *Moldea v. New York Times Co.*, 15 F.3d 1137 (D.C. Cir. 1994) (on initial hearing reversing the district court), with *Moldea v. New York Times Co.*, 22 F.3d 310 (D.C. Cir. 1994) (on reconsideration, Judge Edwards reversed his prior decision in *Moldea I* and affirmed the district court). Judge Edwards admitted to having initially made a "mistake of judgment" and he wrote an opinion correcting that "mistake." 22 F.3d at 311.

28. See, e.g., *Largent v. Largent*, 643 S.W.2d 261 (Ky. 1982) (discussing the Kentucky Court of Appeals decision to reverse itself after rehearing the case).

29. *Lee v. Kemna*, 534 U.S. 362 (2002).

30. *Kyllo v. United States*, 533 U.S. 27 (2001).

Amendment, sided with the prosecutors, and Justice Scalia voted with the flag burner.³¹ Thus, even though a person may generally hold certain views on certain issues, this does not necessarily show how he or she will vote in specific cases. If a judicial candidate does not pledge to support a specific outcome, he or she will be more likely to retain an open mind if he or she becomes a judge and to decide the case on the applicable facts and law.

It is also true that even politicians do not always vote the party line, and judges do so even less often, especially if they have not agreed to tow that line if a case came before them. Even when politicians make specific pledges as candidates—see George H. W. Bush, “Read my lips; no new taxes”³²—they do not always follow them, and sometimes they pay a price for not doing so.³³ Nonetheless, the rules governing judicial elections are surely sensible and in all likelihood constitutional, in at least discouraging, if not banning, promises to decide particular issues in particular ways.

Of course, few if any judicial candidates would make an outright pledge, even without a rule forbidding it. Hence, the question is, what sort of less explicit statements should also be out of bounds? What should be done with the candidate who says, “The court has been letting off too many criminals on illegal searches. That has got to stop. Of course, I will keep an open mind in each case, but the defendant will have to have a very strong claim to prevail.” Under the law of contracts, that may not create a binding promise, even if accepted by the electorate, but it is about as close to prejudgment as one can come with violating the prohibition. If statements like that are not treated like prejudgments, then there is no point in having a no pledge rule. But the no announce rule goes further—indeed, that is the whole point of it—and the question to which I now turn is whether such an extension is justified by the inappropriate speech that it prevents, offset in comparison to the value of the speech that it suppresses.

III. PROBLEMS WITH THE NO ANNOUNCE RULE

Before examining the core functioning of the no announce rule, it is important to understand its extended reach. Most of what judges do is decide cases, but that is not all they do. State supreme courts in particular perform a number of other important functions on which the expression of prior views or even pledges would not be improper.³⁴ One of the most significant is their role as regulator of the legal profession, which includes issuing rules governing the conduct of lawyers and in deciding whether persons who are not members of the

31. *Texas v. Johnson*, 491 U.S. 397 (1989).

32. Charles M. Madigan, *Republicans Lose a Favorite Election Theme*, CHI. TRIB., June 27, 1990, at C1.

33. See, e.g., Steve Daley, *A House Divided, GOP Wonders How to Reunify*, CHI. TRIB., May 1, 1994, at C1 (noting “most blame [President Bush’s 1992 defeat on his] decision to renege on his ‘Read my lips: No new taxes’ campaign pledge.”).

34. See, e.g., James P. White, *State Supreme Courts as Regulators of the Profession*, 72 NOTRE DAME L. REV. 1155 (1997).

bar can perform certain services without engaging in the unauthorized practice of law. Suppose a candidate for the Minnesota Supreme Court believed that many of the current bar rules were outmoded and that lawyers should perform more public service. Since there are many more non-lawyers than lawyers, the hypothetical candidate might decide to run on such a platform, yet Minnesota's no announce rule would prohibit her from expressing those views because those issues might well come before the Minnesota Supreme Court.³⁵ Indeed, in some states, no other governmental body would have the authority to pass on some or all of those issues.³⁶

There are a number of other similar issues that come before courts on which the candidate's views would also be of interest and would not raise due process concerns of prejudgment, even if the views expressed were quite firm. Statements such as "I support (oppose) cameras in the courtroom and will fight for my position if elected," would seem entirely innocuous (except perhaps to other judges), as would pledges such as "I will vote to change the rules on class actions to make it harder (or easier) for plaintiffs to bring such cases," or "I will reform the jury selection system to be sure that every eligible voter is called to serve on a fair and regular basis, and eliminate all the blanket exclusions now in the court's rules." The difference is that, when making decisions on such issues, the court would not be adjudicating a controversy between opposing parties, where bias or prejudgment could raise due process problems, but would be acting more like a legislature or an administrative agency, where the lack of a neutral decisionmaker does not give rise to due process objections. Nonetheless, it is possible that an issue that the court might handle through rulemaking might also arise in a litigated case, and even then, there is *some* danger of a judicial candidate expressing her views too explicitly.³⁷ In any event, there is no reason why any rule on statements of judicial candidates should sweep beyond the area of adjudication into rulemaking functions such as these, which, while arguably substantive and surely not mere administrative issues, do not involve case-specific decisions between opposing litigants.³⁸

35. See Minn. Canon 5(A)(3)(d)(I) (2002).

36. See, e.g., *Bailey v. Utah State Bar*, 846 P.2d, 1278, 1281 (Utah 1993) (discussing an Amendment to the Utah State Constitution that explicitly delegated legal regulatory authority to the state's judiciary).

37. This problem is similar to that faced by the United States Supreme Court when it decides cases involving the Federal Rules of Civil Procedure. See *Order Amending the Federal Rules of Civil Procedure*, Statements by the Justices, 123 L. Ed. 2d lxii (1993) (Scalia, J., dissenting).

38. The Minnesota rule, as written, was not limited to issues likely to come before the court to which the candidate was seeking election, but the Eighth Circuit and subsequently the Minnesota Supreme Court "construed" it to include such a condition. See *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 857 (8th Cir.), *cert. granted*, 534 U.S. 1054 (2001); *In re Code of Judicial Conduct*, 639 N.W.2d 55 (Minn. 2002). In light of Toqueville's observation that "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question," 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 280 (1948 ed.) (1835), that limitation does little to save the rule.

Aside from extending its reach too broadly, the no announce rule also is woefully underinclusive in what it prohibits, or perhaps more accurately, in the time frame in which it operates, because of one exception that is implied if not stated. The rule applies only to statements made while a judicial race is ongoing.³⁹ Thus, no matter how many pledges a candidate has made before declaring himself as a candidate for judicial office, he has not broken the rule so long as he does not repeat them during the campaign, although nothing would prevent his supporters from doing so, as long as the candidate does not cooperate in those efforts.⁴⁰ There is, of course, no realistic, let alone constitutional, way in which that “loophole” could be closed since a rule forbidding anyone who might ever want to become a judge from expressing his or her views on matters that might come before a hypothetical court to which that person might be elected at some time in the future would never be passed or upheld in a First Amendment challenge.

There is a similar problem, probably of greater concern on the issue of possible prejudgment than any that arise from statements made as part of a judicial campaign. One group of candidates already expresses their views on issues that actually come before the courts—sitting judges. Not only do they express their current views on legal issues, but the doctrine of *stare decisis* provides a very strong impetus to follow those announced views in future cases. And the fact that such views are enshrined in formal opinions increases the likelihood that they will be followed by the author (and others who joined her) in future cases, especially when contrasted to views announced on the judicial campaign trail, which may be offered without full opportunity for reflection, not to mention briefing and oral argument. Not only do sitting judges make such announcements before a campaign starts, but they are almost certain to continue to do so while the race is on-going. Of course, some judges may choose to postpone such announcements until the election is over, if that seems more politically advantageous, even if they have already made up their minds on how they will decide the case.

Once again, no one is proposing that judges who are considering running for re-election neither write opinions on recurring issues, nor write any opinions at all while their re-election race is on. That being so, it raises serious questions about whether the no announce prohibition can be defended in light of these gaping exceptions. If it is wrong to express one’s views on issues that may come before the court, how can it matter whether they were expressed the day before the candidate declared for office, the day after, or whether they were contained in a judicial opinion or in response to a question from a voter?⁴¹ Even oral statements can be recorded or at least repeated by friend or foe, and hence *any* prior expression of views on legal issues should be on an equal footing, regardless of when or where the statements were made.

39. See Minn. Canon 5(A)(3)(d) (2002); Code of Judicial Conduct Canon 7 (2002).

40. See Minn. Canon 5(A)(3)(d) (2002); Code of Judicial Conduct Canon 7 (2002).

41. See *Republican Party of Minn. v. White*, 122 S. Ct. 2528, 2537-39 (2002) (noting that time frames makes the no announce clause “woefully underinclusive”).

Finally, there is the problem of uncertainty of the application of the rule, not because the candidate is attempting to come close to the line and not violate it, but because the rule itself inevitably creates problems of interpretation. Clearly, the no announce rule includes more than outright pledges and statements that attempt to come close to the line, but not cross it; otherwise there would be no purpose for having it. Although the majority did not decide *White* on this ground, and the dissent did not comment on it, there is a serious problem of line drawing between the permissible and the forbidden under the no announce rule, which is a further reason to doubt its wisdom.

There will always be uncertainty whenever words are used to describe specific conduct.⁴² However, vagueness and overbreadth are of particular concern in the First Amendment context and are often grounds for striking down a law where either problem exists.⁴³ Where, as here, the penalty for having overstepped the line could include loss of a license to practice law, or removal from judicial office, the need for a precise line is especially strong. However, in *White* the State vacillated on what could and could not be said, not simply because those defending the rule could not agree on the boundaries, but because, in the real world, other than an ironclad promise to decide an issue one way or the other, there are a wide variety of ways along a more or less continuous spectrum, to express the certainty of one's views on a legal issue. The difficulty is in deciding which ones go too far.

Consider the plight of the judicial candidate for the trial court in the Washington case of *In re Kaiser*.⁴⁴ After much debate, the majority held that his statement "I will be a no-nonsense judge" was acceptable,⁴⁵ but his assertion that "I will be tough on drunk drivers" went too far.⁴⁶ It is possible to create a rationale to defend that distinction, but it is equally possible to argue for one that runs the other way, one that condemns both, or excuses both. And that, of course, is the problem, since candidates may be asked questions about their views on certain issues and will have to decide whether to respond at all, and if so, how to word the answer to be as responsive as possible, without stepping over the line. That would be hard enough to do if all the questions were propounded in writing with an opportunity to consult counsel before answering; but that is not the way elections work, even when the race is for a judgeship.

Take two issues that were mentioned in *White* that illustrate the difficulty of line drawing. It appears that no one seemed troubled by "I am a strict

42. For a recent and thoughtful discussion of the problem of translating concepts into words in the patent context, see *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 122 S. Ct. 1831 (2002).

43. See *Smith v. Goguen*, 415 U.S. 556 (1974) (holding that a statute that is "void for vagueness" cannot be constitutionally used to obtain a conviction); see also *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980) (invalidating an Illinois municipal ordinance on the grounds of overbreadth).

44. 759 P. 2d 392 (Wash. 1988).

45. *Id.* at 396.

46. *Id.* at 395-96.

constructionist,” perhaps because in the abstract it is almost meaningless, unless applied to a specific issue, in which case it would be forbidden by the no announce rule.⁴⁷ But what if the statement were made in the context of a discussion of whether the courts have gone too far in protecting the rights of criminal defendants? Would that same statement be taken as an implicit promise to rule more for the government than has been done in the past, and should it be taken that way? The same question could also be asked about discussing a subject that was apparently also not off limits—the candidate’s judicial philosophy.⁴⁸ That phrase can mean anything from the general—“I follow the law and not my personal preferences”—to a quite detailed explication of how the candidate interprets statutes and the constitution, which a student of the court could use to gain a fairly good idea of how the candidate is likely to rule in many cases. Should any or all of those statements be out-of-bounds, and why should some and not others cross the line?

Another area that the defenders of the rule in *White* claimed was acceptable for discussion was prior decisions of the court to which the candidate was seeking election, including criticisms of decisions with which he or she disagreed.⁴⁹ However, if the candidate said that he or she would vote to overturn them if elected, or if he or she acknowledged the power of the court to do so—which any lawyer and many non-lawyers would know without the candidate saying so—that would go too far.⁵⁰ Again, the question is not simply whether these lines are correct or even defensible, but whether a rule governing election conduct that cannot avoid these difficult questions is a sensible one. Moreover, the problem is greatly magnified because of the serious adverse consequences of overstepping the line for a judicial candidate.⁵¹ Thus, at the very least, any no announce-type rule would have to be very carefully drafted and provide clear safe harbors in order to be fair and not suppress too much speech.

IV. THE BENEFITS OF ALLOWING CANDIDATE SPEECH

Imagine if the no announce and no pledge rules could constitutionally be applied to candidates for other elected offices. Elections would be based on the candidates’ qualifications, but not their views. Experience, energy, and intelligence are always valuable assets, but no one would think that what a candidate for a state legislature thinks about taxes, crime, health care, schools, or the environment is irrelevant. Therefore, why should the supporters of the no

47. *Republican Party of Minn. v. White*, 122 S. Ct. 2528, 2533-34 (2002).

48. *Id.*

49. *See, e.g.*, Brief of Amicus Curiae Minnesota State Bar Association at 25-28, *Republican Party of Minn. v. Kelly*, 247 F.3d 854 (8th Cir.), *cert. granted*, 534 U.S. 1054 (2001) (No. 01-521).

50. *See Minn. Canon 5(A)(3)(d)(I)* (2002).

51. Incumbent judges in Minnesota who violate the no announce rule are subject to a range of sanctions including “removal, censure, civil penalties, and suspension without pay,” whereas lawyers who run for judicial office are subject to “disbarment, suspension, and probation.” *Republican Party of Minn. v. White*, 122 S. Ct. 2528, 2531 (2002).

announce rule think that the views of potential judges on the issues that are likely to come before them are irrelevant? Or is there some other valid reason for denying the electorate that information?

The first answer is that judges are different.⁵² They are not politicians, and they should not act like them. In one sense that is plainly correct. If a legislator opposes taxes, he or she can vote to reduce them, but a judge who believes that taxes are too high cannot refuse to enforce the tax laws, any more than he or she could decline to abide by decisions rendering evidence inadmissible under the Fourth Amendment. Judges must follow the law, not negate it, regardless of their personal views of its wisdom.

Accepting that premise does not support the no announce rule, although it may well support the no pledge rule because judges are supposed to be willing to listen to arguments from both sides and not be committed to any outcome in advance. It may also support the decisions of individual voters not to support judicial candidates who act like ordinary politicians because their conduct during their election race suggests that they would behave like politicians, not judges, on the bench. But the fact that a person has views on a subject does not mean that he or she will not follow the law where following the law, not making it, is a judge's responsibility.⁵³ Just because judges are different from governors, attorney generals, and legislators does not justify a rule banning judicial candidates from expressing their general views on issues of interest to voters even if the would-be judge may end up having those issues come before the court.

If judicial elections are inherently so corrupting that they make judges no different from legislators, then the solution is to ban judicial elections, not to reduce the elections to shams.⁵⁴ As Justice Scalia observed in *White*, "much of [Justice Ginsburg's] dissent confirms rather than refutes our conclusion that the

52. This rationale is frequently by supporters of the no announce rule. See, e.g., Brief of Amicus Curiae National Association of Criminal Defense Lawyers at 4, *Kelly*, 247 F.3d 854 (No. 01-521) ("Judges are fundamentally different"); Brief of Amici Curiae Brennan Center for Justice at NYU School of Law et al. at 9, *Kelly*, 247 F.3d 854 (No. 01-521) ("Judges differ from other elected officials both in what they do and in how they do it. These differences justify prohibiting judicial candidates from announcing in advance their positions on issues that are likely to come before them").

53. In fact, many judges have written opinions noting that they disagree with a particular law, and yet upholding and applying that law in spite of their personal preferences. See, e.g., *White*, 122 S. Ct. at 2547 (Stevens, J., dissenting) ("it is equally common for [judges] to enforce rules that they think unwise, or that are contrary to their personal predilections").

54. Although banning elections would make judicial elections less political, banning elections would not entirely remove politics from the judicial selection process. After all, federal judges are not subject to election, but only the hopelessly naïve would contend that the selection of federal judges is an apolitical process. See Laura E. Little, *The ABA's Role in Prescreening Federal Judicial Candidates: Are we Ready to Give up on Lawyers?*, 10 WM. & MARY BILL RTS. J. 37, 48-51 (2001) (noting that the selection of federal judges is an inherently political process); see also *infra* note 85.

purpose behind the announce clause is not open-mindedness in the judiciary, but the undermining of judicial elections."⁵⁵

Second, recognizing that the obligation to follow the law is an essential element of the due process right to a fair hearing does not support a no announce rule. In part, that is because in many cases the law is not clear, as most vividly demonstrated by dissents, reversals, and rehearings. Yet even with this uncertainty, it is a fundamental premise of the law that judges are expected to decide cases under the law as they understand it.

Sometimes the uncertainty is the result of conflicting lines of authorities that have yet to be reconciled, and other times the legislature has, deliberately or otherwise, left a significant ambiguity in a statute with conflicting clues as to how to resolve it. Other situations involve such open-ended constitutional phrases as due process, equal protection, or freedom of speech. While the Supreme Court is most frequently called upon to resolve these questions, state courts, especially the highest court in each state, also decide difficult cases under their statutes, constitutions, and common law. In doing so, these courts sometimes overturn their own prior rulings, disagree with the results in other states, reverse decisions of their own lower courts, and have dissents of their own. As any law student who has completed her first semester will know, a major reason why there are such differences in outcomes is that precedent, logic, and reasoning do not always (some would say do not even often) produce an indisputably correct answer.

How do judges decide these in-between cases when precedents, history, and logic do not provide an answer? Or, perhaps more precisely, how do they examine the conflicting tools and evidence in order to resolve an uncertainty? Like everyone else, they go back to their basic values, principles, and preferences, not to the exclusion of everything else, but more as a prism through which to view the relevant authorities when the answer to the question using the ordinary legal tools remains in doubt. To be sure, some judges find ambiguity more easily than others. However, the point of doubt is eventually reached for everyone, and when that happens, the judge has to reach for something else. Even those judicial candidates who have fairly well-defined approaches to the law have not thought about all, nor perhaps even many, of the issues that might come before them. They also do not have fixed ideas of how they would decide all cases—even in areas where their thinking is quite advanced.

In theory, a judge might have no personal judicial philosophy, no preferences, and no general approach to resolving ambiguities, but we should hope that there are very few judges like that. As Justice Rehnquist observed about the background of Supreme Court Justices in *Laird v. Tatum*,⁵⁶

it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one

55. 122 S. Ct. at 2538.

56. 409 U.S. 824 (1972) (Rehnquist, J., mem.).

another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers.⁵⁷

As recounted by John Dean in his fascinating book, *The Rehnquist Choice*,⁵⁸ President Nixon came quite close to nominating Arkansas bond lawyer Hershel Friday who had given so little thought to issues heard by the Supreme Court that he had to be prompted to react to perhaps the most significant criminal law decision of the Warren Court, *Miranda v. Arizona*.⁵⁹ When then Judge and now Justice Clarence Thomas was asked in his confirmation hearing about his reaction to *Roe v. Wade*,⁶⁰ and he claimed not to have ever seriously discussed the matter.⁶¹ It was unclear whether it was more harmful to his cause if he was less than truthful, or if his statement was accurate and represented a genuine lack of interest in a legal issue of such great importance.⁶²

57. *Id.* at 835.

58. JOHN W. DEAN, *THE REHNQUIST CHOICE* 170 (2001).

59. 384 U.S. 436 (1966).

60. 410 U.S. 113 (1973).

61. *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 102d Cong. 222 (1991).

Judge Thomas: Because I was a married student and I worked, I did not spend a lot of time around the law school doing what the other students enjoyed so much, and that is debating all the current cases and all of the slip opinions. My schedule was such that I went to classes and generally went to work and went home.

Senator Leahy: Judge Thomas, I was a married law student who also worked, but I also found, at least between classes, that we did discuss some of the law, and I am sure you are not suggesting that there wasn't any discussion at any time of *Roe v. Wade*?

Judge Thomas: Senator, I cannot remember personally engaging in those discussions.

Senator Leahy: OK.

Judge Thomas: The groups that I met with at that time during my years in law school were small study groups.

Senator Leahy: Have you ever had discussion of *Roe v. Wade*, other than in this room, in the 17 or 18 years it has been there?

Judge Thomas. Only, I guess, Senator, in the fact in the most general sense that other individuals express concerns one way or the other, and you listen and you try to be thoughtful. If you are asking me whether or not I have debated the contents of it, that answer to that is no, Senator.

Id.

62. See Gary J. Simson, *Thomas's Supreme Unfitness—A Letter to the Senate on Advise and*

However much we should worry about judges having strong views on issues that may come before them, it is in some senses more troubling to find a judicial candidate who has given little or no thought to those questions. Surely, no President would nominate someone for the Supreme Court or even a court of appeals if the would-be judge had no views on any significant legal issues, not only because such a *tabula rasa* candidate might well produce decisions of which the President strongly disapproved—as President Eisenhower did of the rulings of his appointees Chief Justice Warren and Justice Brennan⁶³—but because a person who has reached middle age and who does not have some significant views about legal issues of importance is probably not the kind of person who can be expected to bring the required wisdom to his or her work on the bench. Assuming that it is possible to elect lawyers with few or no views on important legal issues, “it would hardly be desirable to do so. ‘Proof that a Justice’s mind at the time he joined was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of a lack of qualification, not lack of bias.’”⁶⁴ Yet, the no announce rule has prevented the electorate from finding out whether a judicial candidate even has any views on any issues that might come before the court, let alone what they are. Unless one thinks that keeping the public in the dark about the fact that a judicial candidate is a *tabula rasa* on important issues is a positive benefit in a judicial election, the no announce rule is problematic for that reason, as well as others.

The vast majority of judicial candidates, and probably every sitting judge running for re-election, has views on many legal issues covered by the no announce rule. The most important question is, what to do about that fact? The current, albeit unstated, approach taken by the no announce rule is one of “pretending otherwise,”⁶⁵ and asking the electorate to act as if those covered by the rule have no views. The rule, of course, does not preclude candidates from having views, or even from having expressed them before the judicial election race began; it only prevents them from telling the electorate what those views are while the election campaign is underway. Thus, the principal impact of the rule is not to assure that candidates don’t have views on disputed legal issues, but to prevent the electorate from finding out whether they hold views on particular issues and what those views might be.⁶⁶

Consent, 78 CORNELL L. REV. 619, 631-32, 643-44 (1993).

63. When asked if he had made any mistakes as President, Eisenhower replied, “[y]es, two and they are sitting on the Supreme Court.” Laura E. Little, *Loyalty, Gratitude, and the Federal Judiciary*, 44 AM. U. L. REV. 699, 727 n.141 (1995) (citing HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS 266-67 (3d ed. 1992)). President Eisenhower was referring to Chief Justice Warren and Justice Brennan. *Id.*

64. *Republican Party of Minn. v. White*, 122 S. Ct. 2528, 2536 (2002) (quoting *Laird v. Tatum*, 409 U.S. 824, 835 (1972)).

65. *Id.*

66. The no pledge rule could be criticized on the same ground, but it is probably saved because it serves the important purpose of attempting to assure that judges at least remain (or appear to remain) open-minded, even if they have views on disputed legal issues.

The supporters of the no announce rule have never announced that they are engaging in a game of “let’s pretend,” because it would make them look silly to say either that judicial candidates don’t have any views, or that the views that they have don’t matter, at least so long as they don’t tell anyone what they are.⁶⁷ It is the discovery of the falsity of the “it doesn’t matter” proposition that may be what the proponents of the no announce rule fear most because it would unveil the fact that judges do not simply apply law in a mechanical fashion and grind out decisions that ineluctably flow from prior precedents and the plain meaning of statutes and constitutions. Those who deal with the law already know that, and many others surely suspect it. But even if most citizens were to learn that the law is not all logic and reason, that alone could hardly undermine our collective belief in the rule of law. The American people have been exposed to far more damaging truths about our democracy than that there is a personal taint to judicial decisionmaking, and our system of government has still survived. States have another option, and that is to acknowledge that most judges have views, opinions, preferences, and biases—whether called judicial philosophies or something else—and to admit that, in some close cases, those views do matter in how the case is decided. Such a frank acknowledgment might also convey to voters that they are generally better off to know those views before they cast their ballots, rather than being surprised when those views begin to appear in judicial opinions.

Consider some of the issues that could well arise in state appellate courts and even knowing the views of the judicial candidates might affect a voter’s choice. The business community is making a major effort in the courts and in the legislatures to reduce their potential liabilities in a variety of ways. Even if the no announce rule permitted candidates to do so, no judicial candidate would say, “I favor eliminating lawsuits for personal injuries,” but instead he would talk about “tort reform” which can mean a variety of things in different contexts. But the real issues on tort reform on which the voters would like to have the views of the candidates are the role of the jury versus that of the judge, whether courts should take an aggressive stand in policing punitive damages awards, and what the role of the court is under the state’s constitution in reviewing legislation intended to help defendants and make lawsuits more difficult for plaintiffs.

67. Many defenders of the no announce rule did argue that states have a “compelling interest in protecting the *appearance*” of judicial impartiality and/or judicial integrity. Brief of Amicus Curiae National Association of Criminal Defense Lawyers at 17, *Republican Party of Minn. v. Kelly*, 247 F.3d 854 (8th Cir.), *cert. granted*, 534 U.S. 1054 (2001) (No. 01-521) (emphasis added); Brief of Amici Curiae Brennan Center for Justice at New York University School of Law et al. at 28, *Kelly*, 247 F.3d 854 (No. 01-521); Brief of Amicus Curiae Minnesota State Bar Association, at 4, 12-16, *Kelly*, 247 F.3d 854 (No. 01-521). This argument has some merit if its proponents believe the judiciary actually is impartial and unlimited speech in judicial elections may create a misconception to the contrary. However, since all judges are not always impartial, it is much harder to justify covering this fact up from the public. In our system of government, there can be little justification for mandating silence in order to prevent the people from learning the truth about some part of a branch of their government.

Sometimes it is possible to make an educated guess about a candidate's views based on what types of cases the lawyer has handled and whether his clients are generally on one side of a controversy rather than another. But there is no reason why candidates who wish to give more complete explanations of their views on such important issues should not have the right to do so.

Criminal law is another area of vital concern to many voters in elections for appellate court judges.⁶⁸ Issues include the death penalty and how it is administered,⁶⁹ whether state constitutional protections should be read more broadly than those in the Constitution,⁷⁰ and should the court step in to assure that indigent defendants have access to effective assistance of counsel when the legislature has ducked its responsibilities.⁷¹ Even at the trial level, where judges have fewer opportunities to "make law," their views and attitudes make a difference, particularly on matters relating to sentencing. To mention just a few, should repeat drunk drivers receive sentences at the high end of the permitted range?, should husbands who physically abuse their wives be sent to jail?, and how harshly should those found to be in possession of small amounts of marijuana be treated? Does allowing a candidate to say that he will be a "no-nonsense judge," but not more, convey any meaningful information, or should the candidate be allowed, and perhaps even directly requested, to explain what he means by that phrase, in specific contexts? If the voting public is to make reasoned choices, it should have more rather than less information than the permitted code words and stock phrases now provide.⁷²

There are several sets of objections to this approach, to which there are at least partial answers. One claim is that if candidates were permitted to express their views (but not to make pledges), they would feel compelled to do so, even if they would prefer to remain silent.⁷³ There are several responses to this challenge. In the eyes of many voters, silence may be a virtue not a vice, especially if explained by the sensible rationale of not wanting to express a

68. See Charles D. Clausen, *The Long and Winding Road: Political and Campaign Ethics Rules for Wisconsin Judges*, 83 MARQ. L. REV. 1, 49 (1999) (noting that "[c]rime is still at or near the top of voters' concerns" in judicial elections).

69. Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 760 (1995).

70. Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2007, 2054-56 (1988).

71. Ronald J. Tabak, *Capital Punishment: Is There Any Habeas Left in This Corpus?*, 27 LOY. U. CHI. L.J. 523, 531 (1996).

72. As Thomas Jefferson once observed, "I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion." Abrahamson, *supra* note 12, at 993 (quoting Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820) (citing JOHN BARTLETT, FAMOUS QUOTATIONS 344-45 (Justin Kaplan ed., 16th ed. 1992))).

73. See Max Minzner, *Gagged but Not Bound: The Ineffectiveness of the Rules Governing Judicial Campaign Speech*, 68 U. MO. KAN. CITY L. REV. 209, 230 (1999).

position on an issue without benefit of full briefing or argument. Although a candidate may be reluctant to speak out on some, or even a substantial number of issues, if he or she says nothing on *any* issue, the electorate could reasonably assume that either he was hiding something or never gave any of the issues a thought, either of which would be legitimate grounds for voting for someone else. Nor is expressing one's views an all-or-nothing proposition. A candidate could reasonably decide that she will express her views only on those issues to which she has given thought and attention, and there is no reason to think that voters will not appreciate that kind of line drawing.

First, it is sometimes suggested that, in the absence of a no announce rule, candidates will feel compelled to take positions, when they really do not have any views on an issue, or to stake out their position much more definitely than their actual views would support.⁷⁴ That claim assumes a level of political involvement and pressure in judicial campaigns that does not, except in rare cases, seem borne out by experience and is contradicted by the fact that judicial races are often near the bottom of the ballot and command very little media attention.⁷⁵ It also assumes that candidates for judgeships lack backbone and will bend to every request for a position on any issue. It also assumes that voters will not accept a candidate's explained reluctance to express a view, or her statement that "in general I support that position, but I have not thought through how it would apply in every case, and so would want to leave open the question in cases other than those we have just discussed." By and large, voters know that judges are different, they are aware of the dangers of pre-commitment, and they will refuse to vote for judges who are not open to reasoned argument on legal issues.⁷⁶

Second, if candidates are allowed to express their views, it is argued that sitting judges will be forced to engage in the unseemly act of defending their opinions.⁷⁷ That, in turn, may lead them to add inappropriate qualifications or

74. See Neil K. Sethi, *The Elusive Middle Ground: A Proposed Constitutional Speech Restriction for Judicial Selection*, 145 U. PA. L. REV. 711, 711-22 (1997).

75. This is not true in all elections, nor is it true with all voters—but voters in judicial elections are generally less passionate and less informed than voters in other elections. See Pamela S. Karlan, *Two Concepts of Judicial Independence*, 72 S. CAL. L. REV. 535, 541 (1990) ("Judicial elections are usually deracinated, low-salience affairs."); Nicholas P. Lovrich et al., *Citizen Knowledge and Voting in Judicial Elections*, 73 JUDICATURE 28 (1989); Nicholas P. Lovrich, Jr. & Charles H. Sheldon, *Voters in Judicial Elections: An Attentive Public or an Uninformed Electorate?*, 9 JUST. SYS. J. 23 (1984); Charles H. Sheldon & Nicholas P. Lovrich, Jr., *Knowledge and Judicial Voting: The Oregon and Washington Experience*, 67 JUDICATURE 234 (1983).

76. Texan voters' reaction to Judge Jack Hampton provides a particularly poignant example of the electorate rejecting a judge who refused to apply legal reasoning and instead rendered decisions based on his preconceived opinions. Judge Hampton gave an unusually light sentence to a defendant who murdered two gay men and explained his decision by stating "I put prostitutes and gays at about the same level. And I'd be hard put to give somebody life for killing a prostitute." Karlan, *supra* note 75, at 542. The Texas electorate responded by not retaining Judge Hampton. See *id.*

77. See Stephen J. Fortunato, Jr., *On a Judge's Duty to Speak Extrajudicially: Rethinking the*

amplifications, without benefit of full briefing and argument. Of course, judges would not be required to answer questions or charges, but at least they would have the opportunity to offer whatever explanation they deem proper under the circumstances. Indeed, one of the objections that sitting judges have to elections is that their record is attacked by their opponents or by interest groups opposing them (often on the basis of a single issue).⁷⁸ Under current practice, judges are not allowed to respond, which would no longer be a problem if rules like the no announce rule were eliminated. And even if some judges might make inappropriate comments about a prior opinion during an election race (rather than before or after it), that does not justify muzzling all judges or all candidates, and such comments are unlikely to increase the problem of prejudgment to any significant degree.

Third, some candidates will cater to what they perceive to be the wishes of the voters,⁷⁹ with the death penalty often given as the most prominent example.⁸⁰ The first and most definitive answer is that candidates in any election will feel pressure to say what they believe the voters want to hear. Having decided to elect judges, it is hardly a defense to a no announce rule to claim that voters will want to hear what the candidates have to say on issues that voters think are relevant, especially where the failure to allow such discussion is likely to cause frustration on the part of voters and/or candidates. Moreover, even if candidates are forbidden to announce their views, nothing can or does stop their supporters from doing so on their behalf, and it is surely better to have the candidates explain their positions directly, rather than through code words or using surrogates, and hence be responsible for the impressions that reach the voters.⁸¹ This objection also assumes that voters will not be able to detect pandering and/or will be favorably disposed toward judicial candidates who act like ordinary politicians.⁸² With the no announce rule eliminated, it is more likely

Strategy of Silence, 12 GEO. J. LEGAL ETHICS 679, 705-06 (1999) (noting some of the problems created when judges have to publicly defend case rulings).

78. See Grimes, *supra* note 12, at 2321 (noting that judicial elections usually “focus on hot-button issues like the death penalty or abortion”).

79. See, e.g., John D. Fabian, *The Paradox of Elected Judges: Tension in the American Judicial System*, 15 GEO. J. LEGAL ETHICS 155 (2001).

80. See *id.* at 156-59, 161-73 (discussing and giving numerous examples of the death penalty affecting both the behavior of judges facing election and the outcome of judicial elections).

81. Both the Minnesota Canon and the Model Rules contain prohibitions against judges knowingly using supporters to circumvent the no announce rule. See Minn. Canon 5(A)(3)(c) (2002) (“[forbidding judges from] authoriz[ing] or knowingly permit[ting] any other person to do for the candidate what the candidate is prohibited from doing under the Sections of this Canon”); Model Code of Judicial Conduct Canon 7(B)(1)(b) (2002) (stating that a candidate “should not allow any other person to do for him what he is prohibited from doing under this canon”). Requiring proof of knowledge makes the rules essentially unenforceable.

82. Wisconsin Chief Justice Shirley Abrahamson, with whom I generally agree, has a different view: “Good judging is good politics. I am persuaded that the bar and the public will support judges whom they perceive as independent even if they do not agree with particular

that there will be full debates on the issues, at which candor, not pander, would be the key to success.

Fourth, there is a concern that the demise of the no announce rule will encourage candidates to speak out in order to attract the money they need to get elected. In states like Texas and Ohio, where judicial races for the state's highest court now cost millions of dollars,⁸³ a great many donors are already figuring out what positions at least one of the candidates is likely to take on issues that matter to them. Those contributions, running into tens of thousands of dollars in some cases,⁸⁴ are surely not being made in the interest of securing a neutral and effective judiciary. Thus, it is hard to see how the no announce rule has lessened the money race. Those with the money and the greatest self-interest in how a candidate is likely to rule on issues of importance to them are able to learn a candidate's position by examining which kinds of clients she represents, in which kinds of cases, and by talking with friends and perhaps clients who know the candidate's views from pre-election discussions and who are not barred from repeating those views to others who wish to learn them. And in some cases, the candidate may have written articles or given speeches before becoming a candidate (or in the case of a sitting judge, written opinions on subjects of interest), and nothing prevents his supporters from using those to raise money for his election. There is no doubt that private financing of judicial races produces very serious due process issues, especially with very limited recusals based on such contributions, but the marginal harm, if any, in this area caused by abolishing the no announce rule would seem to be between slim and none.

When states decide to elect their judges, those elections are not simply about who has the best resume or who has the highest reputation for integrity and fairness, although those factors are relevant. Anyone familiar with how courts decide cases knows that judges differ in their approaches to deciding cases and that all judges don't follow the same approach in all types of cases that come before them. And it cannot be seriously disputed that those differences matter in at least some cases, often some of the most significant ones, because those are the cases where the basic tools of judicial decisionmaking do not lead to a single right answer.

The no announce rule pretends that judges do not have views on issues that will come before them, and that if they have them, that is of no proper concern to the voters. Both of those premises are without basis, and to the extent that there is any truth to them, they would not support the no announce rule. Thus, even if there were some reason to believe that the no announce rule prevented some serious harms beyond those covered by the no pledge rule, the current rule

decisions." Abrahamson, *supra* note 12, at 986.

83. See *Republican Party of Minn. v. White*, 122 S. Ct. 2558, 2542-43 (2002) (O'Connor, J., concurring).

84. For example, "[t]he contribution limit for a Texas Supreme Court justice . . . is a maximum of \$5,000 from an individual and \$30,000 from a law firm." David Barnhizer, "On the Make": *Campaign Funding and the Corrupting of the American Judiciary*, 50 CATH. U. L. REV. 361, 418 (2001).

is underinclusive, because it reaches only those announcements made during the election (and even then does not cover the opinions of sitting judges), and its boundaries are impossible to police as a practical matter without discouraging candidates from saying anything at all of interest to the electorate. It is time to discard the no announce rule and others like it and to recognize that the electorate should be given vital information about the views of judicial candidates, just as they receive it about candidates for other elected offices. Covering up the reality of how judges make decisions may make some people feel better, by pretending that deciding a legal issue never involves the personal views of a judge, but it doesn't comport with the real world of judging. It's time to remove the fig leaf that the no announce rule provides.⁸⁵

V. ENFORCEMENT ISSUES

There are two major problems relating to enforcement of the rules on candidate speech during elections that should be addressed regardless of the substance of what the rules prohibit. First, the rules are enforced, like other disciplinary rules, by an arm of the state, which means, as *White* demonstrated, that the First Amendment heavily influences what can and cannot be proscribed.

85. The same need for information about the views of judicial candidates applies when judges are appointed as well as when they are elected. Indeed, many state court judges who are eventually elected to office, first become judges through an appointment process that fills a mid-term vacancy. The main difference is that the context in which the would-be judge might make his/her "announcements" is changed. In the appointment context, any "announcement" would occur either in the private process by which the appointing authority and his/her staff decide whether the candidate's views are compatible with the appointer, or in the public hearing at which a legislative body determines whether the appointment should be approved. Indeed, this difference in context eliminates some of the objections to abandoning the no announcement rule, such as the fears of pandering to the electorate and needing to take positions to raise campaign money. But if the goal of these rules is to prevent conduct during the period before a person becomes a judge from affecting the judge's performance after being sworn in, the method of judicial selection should be irrelevant because the role of the judge once she dons her robe is the same. And, insofar as the rules prevent those responsible for making the judicial selection from learning the views of potential judges, the objection to them applies to appointed judges as well, and, in the context of a lifetime appointment to federal courts, may take on even greater significance.

A major problem with the current system is that nominees often decline to tell the confirming body their views on issues on the grounds that by doing so they might be seen as committing themselves to a position without knowing all the facts and hearing all the legal arguments. That position—essentially a no pledge defense—seems perfectly reasonable with one exception: if nominees announce their views on an issue to the appointing authority or to those who are advising him/her, they should not be allowed to withhold similar information from the confirmation body. If that information is relevant and does not amount to prejudgment before a nomination is made, it is equally relevant and non-judgmental afterwards. Otherwise, the confirmation process breaks down and does not serve as the check that it was created to be. See Alan B. Morrison, *Time for a Bigger Audience*, LEGAL TIMES, Mar. 3, 2003, at 46.

This problem is magnified because of the potential penalties that can be imposed, ranging from admonitions to removal for a sitting judge,⁸⁶ and from a reprimand to disbarment for a lawyer.⁸⁷ That does not mean that the most severe punishment is likely to be imposed, but even a remote threat of it will cause all but the most fearless to hold back. Second, there is a special problem when judges have to pass judgment on fellow judges, either those who sit on their own courts or those whose decisions they review. In either case, there are potential pitfalls that should be avoided if at all possible. As I explain below, if a private body is established, with no power other than moral suasion that it can bring to bear, both of these problems will disappear.

Given these potential problems with enforcement by an arm of the state, the first inquiry should be, is there a real need for the state to gear up its enforcement mechanism and be prepared to impose stiff penalties in this situation? We are, after all, not dealing with someone charged with inflicting either physical or financial harm on anyone else. At worst, the candidate will have said something that might be seen as pledging to decide a case in a particular way, for which there is the existing remedy of recusal should that situation ever arise. While in theory a candidate could make so many promises during a campaign as to require wholesale recusals, there is no reason to believe that the voters would ever elect such a person to serve as a judge. Surely, that remote possibility cannot justify using the state's enforcement mechanism in every case where someone is charged with crossing a very difficult-to-locate line.

Without a state enforcement scheme, including state-imposed penalties for violating the rules, the very serious line drawing problems largely vanish. The only "penalty" would be a public determination by a group of private citizens that it believes the candidate has crossed the line. If a candidate is concerned that a statement that she intends to make might go beyond the accepted norms, the fact that there are only very limited "sanctions," if they can even be called that, drastically reduces the chill from the uncertainty, even if the determination is made public during the campaign. Moreover, as the dissent of Justice Ginsburg in *White* observes,⁸⁸ it is not difficult for a candidate to avoid making a pledge, but still provide a very strong indication of which way he is likely to vote. That observation, as well as the concluding portion of that dissent, also underscores the uncertainty of where a pledge ends and an announcement begins. Line drawing can never be eliminated, but ending state enforcement can greatly diminish the consequences of overstepping the inherently imprecise boundaries

86. See *In re Disciplinary Proceeding v. Kaiser*, 759 P.2d 392, 400-01 (1988).

87. See Jennifer L. Brunner, *Separation of Power as a Basis for Restraint on a Free Speaking Judiciary and the Implementation of Canon 7 of the Code of Judicial Conduct in Ohio as a Model for Other States*, 1999 L. REV. MICH. ST. U.-DETROIT C.L. 729, 729 n.63 (1999) (noting that lawyers can be disbarred for failing to abide by speech regulations when campaigning for judicial office); Elizabeth I. Kiovsy, *First Amendment Rights of Attorneys and Judges in Judicial Election Campaigns*, 47 OHIO ST. L. J. 201, 203 (1986) (noting that violations can be punished with "reprimand, suspension, or disbarment") (citations omitted).

88. See *White*, 122 S. Ct. at 2558 (Ginsburg, J., dissenting).

in this area.

The problem of judges enforcing these rules against a practicing lawyer is serious enough (especially if the lawyer ran against a sitting judge), but when it is a sitting judge who has been charged, it becomes even worse, particularly if the judge is on the same court as those who are judging him.⁸⁹ In such a situation, will it ever be possible for those sitting in judgment to divorce the question of whether the rule was violated from whether they would or would not have done something similar when they were running for office? And will some judges feel more or less inclined to impose a sanction based on whether the accused votes with or against them? And think about the relationships between the accused and the rest of his court while the disciplinary proceedings are underway, including the possible perception that votes on substantive issues may be traded for votes in the disciplinary process. One need not doubt the wisdom of the decision to assign the disciplinary duty to the state's highest court when there are serious charges of wrongdoing made against a judge, but that does not mean that the court should also be in the business of policing charges (often made by an election opponent) that a judge has crossed the line by a statement made during an election race.

As a recent report by the Constitution Project recognizes,⁹⁰ these problems can be largely eliminated by ending the state enforcement of whatever rules are in place and leaving the job of deciding whether the rules have been violated to a private, volunteer body, composed of lawyers (including possibly some retired judges) and non-lawyers who are concerned with judicial elections. Such a body would have no powers of enforcement; it could do no more than announce its conclusions about whether the conduct at issue fell on one side of the line or the other. It might need some staff, at least during election season, which could probably be funded by the state without making the actions of the body the actions of the state, at least as long as those who decided these claims were not appointed by the state, and were not state officials for any other purpose.

Such a body would act based on complaints submitted to it or on its own if it learned of a candidate who may have gone too far. It would have to have some ability to investigate, and it should be obligated to provide the candidate an opportunity to submit evidence and/or be heard in person, but it should not have subpoena power. Since its only power would be to decide whether a candidate for judicial office had complied with an applicable rule and then to make that decision public, it would have to be able to act quickly so that the candidate could both explain his position with respect to any conclusion that the body reached, and the electorate could take into account both views of the challenged

89. See Patrick D. McCalla, *Judicial Disciplining of Federal Judges is Constitutional*, 62 S. CAL. L. REV. 1263, 1283 (1989) (discussing the dangers of sitting judges being subject to judgment by their colleagues).

90. THE CONSTITUTION PROJECT, UNCERTAIN JUSTICE: POLITICS & AMERICAN'S COURTS 101-04 (2000), available at http://www.constitutionproject.org/ci/reports/uncertain_justice.pdf. The report also correctly observes that other related issues involving the conduct of judicial campaigns could also be handled by such a body. See *id.*

conduct in deciding how to vote. And, unlike the current system, which only operates long after an election is over, and the candidate is either a sitting judge or not, a private system would provide useful and timely information to the people who most need it—the voters.

A number of states are now experimenting with taking enforcement of judicial election rules out of the hands of the judiciary.⁹¹ Some of the bodies are clearly official governmental entities, even though they include private persons; others may be governmental, but their status as state actors is either unclear or may depend on what they are doing; and others seem to fall on the private side of the line and not be subject to the restrictions of the Fourteenth Amendment.⁹² Their use is a fairly recent phenomenon and is very much in the experimental stage, not only over what functions should be assigned to such a body, but how its members should be chosen and from what different constituencies and/or professions.⁹³ Moreover, given the differences between local elections for trial judges and broader geographic elections for appellate judges, as well as differences among the states where judicial elections are held, this is clearly an area where one size does not fit all, and where there is much to be learned about whether the theory of using private bodies will work in practice.⁹⁴

Although many details would have to be worked out, the principle of taking the job of watching over judicial elections from the state and assigning it to a non-governmental body would go a long way toward reducing, if not eliminating, the problems with the current enforcement system. And once the state was no longer doing the “enforcing,” the First Amendment would no longer have to be considered in designing rules for judicial election campaigns.

Another way to “enforce” the no pledge rule and whatever rules may follow *White* is to provide more teeth into the requirements for recusals, in particular by making it clear that they apply where a judge makes a statement that a reasonable person would construe as amounting to prejudgment of an issue in a case pending before the judge.⁹⁵ Justice Rehnquist in *Laird v. Tatum*⁹⁶ specifically recognized that some prior statements by judges could provide a proper basis for recusal, although he concluded that his expression of prior views in that situation were

91. See Barbara Reed & Roy A. Schotland, *Judicial Campaign Conduct Committees*, 35 IND. L. REV. 781 (2002).

92. *Id.*

93. See *id.*

94. See Steven Lubet, *Judicial Campaign Conduct Committees: Some Reservations About an Elegant Solution*, 35 IND. L. REV. 807 (2002).

95. The insufficient nature of some state recusal laws is poignantly illustrated in the case of *State v. Kinder*, 942 S.W.2d 313, 321-22 (Mo. 1996), where the Missouri Supreme Court refused to disqualify a judge who issued an arguably racist campaign release six days before presiding over a capital case involving an African-American defendant, even though the judge sentenced the defendant to death. The majority of the Missouri Supreme Court did not find a due process problem.

96. *Laird v. Tatum*, 409 U.S. 824, 835 (1972) (Rehnquist, J., mem.).

not disqualifying.⁹⁷

If a campaign statement were a possible basis for recusal, that would reintroduce the First Amendment into the matter, but with a number of significant differences. First, there would be little if any impact on what was said during an election because the consequence of straying over the line would not be subject to discipline of any kind. The possibility of removal from a case should the issue on which the judge (and never just a candidate) had spoken actually comes before that judge is unlikely to deter any statements short of an outright pledge. Second, instead of considering the judge's statement in the abstract, which means considering the theoretical impact it might have, it would be viewed in the context of a particular case, thereby making the connection between statement and litigation much less speculative. Third, the only "punishment" a judge would receive would be disqualification from a case, a very different result from possible removal from the bench or a public sanction for a judge, or suspension or a public reprimand for a lawyer-candidate.

There is also the question of how to phrase the recusal requirement to prevent both excessive and parsimonious reactions from the judiciary. Given the lack of experience on this issue due to the recent demise of the no announce rule, it would be best to proceed cautiously. Thus, a quite modest change, doing no more than reminding judges of the possibility that their campaign statements might be a ground for recusal, would seem to be an appropriate starting point. For example, if something like the basic federal recusal statute⁹⁸ were used by a state having judicial elections, it could be amended to make this point by adding the italicized words: "Any justice, judge, or magistrate . . . of the United States shall disqualify himself [sic] in any proceeding in which his impartiality might reasonably be questioned,"⁹⁹ *including questions based on statements made by him in connection with a judicial election.* In time that may not prove strong enough, or perhaps too strong, but it would seem to be about right for a start.

CONCLUSION

One of the principal problems for those who have been writing rules for judicial elections is that they fail to come to grips with what should be the most basic question: If we are having an election, what is the election supposed to be about? In part, that failure may be due to the fact there is a real reluctance on the part of lawyers and judges to admit publicly that the personal views of judges do matter in at least a fair number of significant cases. As a result, the existing rules attempt to cover up those views and, in effect, pretend that the candidates either do not have any views or that the ones that they have don't matter. This essay tries to explain why the attempted cover-up will not, and should not, be allowed to prevent the public from learning at least some of those views and that, more importantly, the public and the judicial system would be better off if the

97. *See id.*

98. 28 U.S.C. § 455 (a) (2002).

99. *Id.*

candidate's views were known by more of the voters before elections, and not just afterwards.

This essay also recognizes that the rule forbidding pledges or promises on how the candidate would vote on specific issues promotes the important public purpose of assuring that judges retain an open mind on questions that may come before them. While that rule, narrowly construed, is a sensible means of achieving that goal, the no announce rule goes far beyond it by suppressing valuable, relevant speech during the time when the public is most concerned about the issues. Thus, even if the First Amendment did not compel the states to eliminate the no announce rule, and to re-evaluate other rules limiting judicial campaign speech, the rationales supporting those rules fall far short of offsetting the benefits that would be derived from eliminating all but the no pledge rule.

The difficulties with all of these rules is compounded by the fact that they are enforced by the state, with potentially very severe sanctions in situations where it will often be difficult to determine in advance on which side of the line the challenged speech falls. Taking enforcement authority from the state, and substituting a private body that would have only the power of persuasion—to inform voters that a neutral body believes that a candidate overstepped the line—would be a positive change, regardless of what the substantive rules might be. But if a state attempts to continue to have rules like the no announce rule that suppress relevant speech during judicial elections, state enforcement and the First Amendment will, and should, make it almost impossible to sustain them.

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LECTURE

THE ETHICAL LAW SCHOOL*

GRAHAM ZELICK**

PROLOGUE

It is a singular honour to be invited to deliver this lecture, only the second in the series, and to have been invited from overseas to do so. My selection may be as much a mystery to you as it is to me, but I do know of Professor White's strong links with the United Kingdom, his many friendships there and the highest regard in which he is held by the legal community. Jim's contribution to legal education is outstanding and I derive considerable pleasure, in giving this lecture, in being associated with that remarkable record which this lecture series commemorates and which in large measure we are here today to recognise and celebrate.

The subject I have chosen draws as much on my experience as a university president as it does as a law professor or dean. I address it, not as a moral philosopher or ethicist, but as a pragmatist. I have chosen it, not because of any ethical deficit or perceived deficit in law schools either here or in the UK, but because it is a topic I regard as important, and it is something which it is so easy to take for granted that it can slip from consciousness and visibility when it is essential that it should be explicit and conspicuous.

I have tried to translate these remarks into American-English: so, even where I am referring to Britain, I shall employ American usage (except where I am quoting): thus, academic staff will be faculty, law teachers will be law professors, vice-chancellors or principals will be presidents, senior academic

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** President and Vice-Chancellor of the University of London; B.A., 1970, M.A., 1974, Ph.D., 1980, University of Cambridge; Hon. L.H.D., 2001, N.Y.U.; Hon. LL.D., 2003, Richmond—The American International University in London; Barrister of the English Bar; Academician of the Academy of Learned Societies in the Social Sciences; Emeritus Professor of Law in the University of London; Master of the Bench of the Middle Temple; Honorary Fellow of Gonville and Caius College, Cambridge; Honorary Fellow of the Society for Advanced Legal Studies; sometime Principal of Queen Mary and Westfield College, University of London, Dean of the Faculty of Laws, Queen Mary College and the University of London; formerly Chairman of the Committee of Heads of United Kingdom Law Schools and member of the Lord Chancellor's Advisory Committee on Legal Education. I am grateful to Adam Zellick and Lara Zellick for their comments on an early draft.

managers will be administrators and high school pupils will be students.

INTRODUCTION

One of the implicit objectives of formal governance arrangements in our universities is to secure and promote propriety, integrity and fairness. We have known for a long time that these are qualities to be highly prized and esteemed in our government and the professions. We have long known that one of the hallmarks of a profession is that it operates according to strict ethical rules. We have come a long way since 1852 when it could suffice to pronounce that an advocate should act "with the character of a Christian gentleman";¹ or as Lord Esher MR put it in 1889: "[The solicitor's] duty was . . . not to fight unfairly, and that arose from his duty to himself not to do anything which was degrading to himself as a gentleman and a man of honour."² Watergate provided a powerful reminder of the temptations to which lawyers might fall prey and reinforced the need for courses in legal ethics for anyone aspiring to become a lawyer, but this lecture is not about what law students or young lawyers should be taught by way of ethics nor what those ethical rules might be.

Just as Watergate reminded us of the ethical responsibilities of lawyers, so recent events in the commercial and corporate world have reminded us of the temptations lying before other professionals, such as auditors and accountants; and it has also brought home to us the incomparable importance of ethics and integrity in the conduct of corporations and the devastating consequences when those standards are not met.

Universities have to be ethical bodies if they are to expect their graduates to conduct themselves ethically throughout their lives. Not that it will ensure that they will do so, but the example has to be set. Universities also have a responsibility to society. The academy must occupy the high moral ground. So, too, must each and every part of the academy. I shall deal specifically here with the law school, but my remarks are equally apposite for every other part of the university and indeed the university as a whole.

We cannot urge our students to absorb the principles of ethical practice just by teaching them if we do not as a community conduct ourselves in a way that is itself ethical and conducive to ethical outcomes. To teach or preach legal ethics but to behave unethically would be sheer hypocrisy. Our discipline, however imperfect, is after all about the quest for justice. We are deeply versed in the principle of legality, in due process, legal protection, constitutional guarantees, non-discrimination and equality. Within the academy, the law school should in these matters be an exemplar and beacon.

I. THE ELEMENTS OF THE ETHICAL LAW SCHOOL

What I mean by "ethical" in this context should become clear as I proceed, but I should elaborate briefly at this point. I mean no more than that the law

1. EDWARD W. COX, *THE ADVOCATE* 54 (1852).

2. *In re G. Mayor Cooke*, 5 T.L.R. 407, 408 (Eng. C.A. 1889).

school and its members should act with integrity and propriety, faithful to the values of the university, the principles on which it is founded, and the objectives to which it is dedicated. This, for example, would encompass fidelity to proper procedures, observance of due process, intellectual honesty, civility in debate, respect for academic freedom, personal probity and collegiality.

Some assistance can be derived from the British Committee on Standards in Public Life which has enunciated seven Principles of Public Life³ (which apply to universities in the UK and are, I suggest, equally apt here in the USA):

- **Selflessness:** Holders of public office should make decisions solely in terms of the public interest. They should not do so in order to gain financial or other material benefits for themselves, their family, or their friends.
- **Integrity:** Holders of public office should not place themselves under any financial or other obligation to outside individuals or organisations that might influence them in the performance of their official duties.
- **Objectivity:** In carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit.
- **Accountability:** Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.
- **Openness:** Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.
- **Honesty:** Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.
- **Leadership:** Holders of public office should promote and support these principles by leadership and example.

I shall describe what I mean by the ethical law school in the following categories:

- Ethical in the way the law school conducts its essential work in teaching and research.
- Ethical in the way it maintains and promotes these values and reacts to breaches.
- Ethical in the way members of the law school community behave to one another.
- Ethical in the standards of non-academic behaviour of faculty, administrators and students.
- Ethical in the way the law school manages its affairs.

3. FIRST REPORT OF THE COMMITTEE ON STANDARDS IN PUBLIC LIFE, 1995, Cm. 2850-I.

- Ethical in a broader social context.

The school's ethical obligations are owed to the several constituencies which constitute the law school community – faculty, staff, students and alumni – and to external stakeholders, including the rest of the university, donors and potential donors, potential students and applicants, funding authorities, the legal community and the wider society.

I recognise that, in some or even all of these categories, the law school will not be entirely autonomous but at points will interact with the university of which it is a part. Nevertheless, law schools have sufficient autonomy and sufficient individual identity that these considerations do to a large extent fall within their responsibility, and they certainly have considerable scope to meet these criteria or, sadly, fail to meet them.

A. Ethical in the Way the Law School Conducts Its Essential Work in Teaching and Research

Responsibility here falls on faculty as teachers and researchers and on students, for together we constitute the scholarly community that is the law school. I still subscribe to that quaint notion of collegiality that in my view is the quintessential quality of the true university, but in any event faculty and students are part of a common enterprise of learning, scholarship and research. What, then, does it mean to be ethical in the way we carry out our work in teaching and research?

In teaching, it means that we put truth, balance, and fairness above all other considerations and that we make every effort humanly possible to put aside personal views on politics, religion or whatever. Our students are old, educated, and sophisticated enough to cope with such views when they are expressed, but they must, if they are expressed, be presented in a way that makes it clear they are the personal views of the teacher and constitute commentary or criticism. What I am objecting to is analysis which distorts what, for example, the text of a judgment truly says because it is being corrupted by political or religious bias of some kind. I have known legal scholars and even judges fall prey to this temptation—to use their reputation and authority to portray a legal text or authority in a way that can only be described as perverse or disingenuous.

There are those who will say that this is absurd: that the law is so inherently biased and political itself, the product of the interplay of power and politics, that to pretend there is some ultimate truth is at best a chimera and at worst so naïve as to be ridiculous. But that would be to misunderstand my point. I can accommodate the political or intellectual gloss provided that a real attempt is made to treat the text in a way that is honest and realistic. I am certainly not arguing for an uncritical approach to law; nor for one moment do I have any illusions about the law-making process. To encourage a critical approach in one's students, from every perspective, is one of the duties of the law professor, but that is different from indoctrination and corrupting the sources by imposing upon them one's personal political or religious views, which, in my submission, constitutes an abuse of authority.

The same obligation arises in relation to research and publication. Willfully

to misread or to quote out of context are ethical failings. Plagiarism is an obvious offence. There are not the same opportunities for research fraud in our discipline as there are in the sciences and the empirical social sciences, where sadly there is today evidence of not inconsiderable malpractice.

Faculty also have an obligation to the school, their colleagues and students to teach effectively and diligently, to attend classes, set and grade assignments in timely fashion and be available for consultation; to grade examinations with integrity and impartiality; to carry out administrative duties efficiently and responsibly; to undertake research and publish where this is required; and to balance duties to the school with outside commitments such as legal practice and government service. Failures in any of these areas are not just employee deficiencies: they are unprofessional and unethical.

So far as the students are concerned, the same duty falls on them to attain the highest standard of honourable conduct in their academic work. Thus, any form of cheating or plagiarism must be regarded as a violation of the essential values of the law school.

Let me here say something about academic freedom, which clearly ranks as one of our fundamental guiding values. The principle finds limited expression in British law in the Education Reform Act 1988 which somewhat inelegantly acknowledges "that academic staff have freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges."⁴ This is reinforced by the Human Rights Act 1998,⁵ which incorporates into British law the European Convention on Human Rights, with its guarantees of freedom of thought, conscience, religion, expression and assembly, and which applies to universities as "public authorities."⁶

So far as law school authorities and administrators are concerned, academic freedom works in two ways. It limits their power to encroach upon the work of faculty which enjoys the protection assured by the principle of academic freedom, although it most certainly does not mean that the quality, value or acceptability of all academic work is beyond question. No such privilege protects a scholar. Admittedly, there can sometimes be difficult issues of discrimination and judgment as to when the principle applies to a particular case and when scrutiny, adverse judgment and action are permissible. That is the principle of academic freedom operating as a curb on the administration: but it must also be a shield, for the law school administration, and indeed the school community as a whole, must be quick to defend the academic freedom of faculty and students where others within the community or outside seek to curtail it, whether for reasons of political correctness or otherwise. A law school fails in its ethical duty if it is not vigorous and energetic in its defence of the academic freedom of members of its community, even where they enter into delicate, sensitive and controversial terrain and cause upset. If free speech cannot flourish

4. ch. 40, § 202(2)(a) (Eng.).

5. ch. 42, § 1, sched. 1 (Eng.).

6. *Id.* § 6(3)(b) (Eng.).

in our law schools and universities, where will it be safe?

B. Ethical in the Way the Law School Maintains and Promotes These Values and Reacts to Breaches

Every academic institution must have its disciplinary codes and procedures for faculty and students and its procedures and protocols for the conduct of research and for dealing with allegations of research fraud. I take all that as axiomatic. But the test of whether a law school is ethical is not whether these instruments are in place and fit for purpose—which I will assume they are—but whether there is in practice a willingness to invoke them in appropriate cases.

Faculty have been known to falsify their resumés or lists of publications, and research fraud of various kinds is becoming increasingly common; and we have found in recent years a growing incidence of plagiarism in doctoral theses and of cheating and other irregularities by students in examinations. The honour codes of American colleges and universities are unknown in Britain and are outside my own experience. They may be effective instruments, but on principle I prefer the arrangements to which I am accustomed in which the institution itself has responsibility, but typically involving a student on any disciplinary panel.

It was certainly true in the past in my country, and may still be the case in some circumstances, that irregularities and improprieties, and deficiencies in performance, were not dealt with, that the authorities preferred if at all possible to ignore them, and there was a profound reluctance to instigate formal procedures. Where there is evidence of wrongdoing, incompetence or under-performance, the law school must act. I do not say that every case must be dealt with in accordance with the formal procedures if an informal outcome is appropriate. For example, where a faculty member offers to resign, there is no need to pursue formal proceedings leading to dismissal. The resignation should be accepted. But it should not be accepted on an unethical basis, such as over-generous financial terms or agreeing to provide a reference which omits material information.

Informal resolution has two advantages. It saves time and money and, above all, it provides certainty of outcome, which can never be guaranteed when normal internal disciplinary procedures are instituted.

The law school or institution acts ethically only where it takes well-found allegations seriously, investigates them vigorously, though of course fairly, and is prepared to take the appropriate action. Faculty members who have infringed the fundamental norms of scholarly life or who have displayed conspicuous lack of integrity have no place in the academy.

C. Ethical in the Way Members of the Law School Community Behave to One Another

We have over the years seen tensions on university campuses. They can arise for all sorts of reasons. The events taking place may have nothing whatever to do with the university, but are aimed at influencing government or they may be directed at the university administration. Sometimes the problems arise because of tensions between different groups within the university community.

have seen that in Britain over the years on a number of our campuses with hostility to Jewish and Muslim students, which resulted in my chairing a national day of action on extremism and intolerance on the campus. We made a number of recommendations for setting and enforcing appropriate standards of conduct. Let me quote from our report:

[T]his report does not seek to abridge legitimate freedom of speech or to curb what is merely unorthodox or causes irritation or discomfort. It is aimed at more serious conduct which is not compatible with university values, such as intimidation by one student group of the members of another on account of the latter's views, policies or political or religious affiliations; attempts by one group to have another group banned solely on account of its views, policies or affiliations; the distribution of literature which induces fear or anxiety in others within the university community; or arranging meetings at which views are expressed which put others in fear

Universities have a number of responsibilities, obligations and duties which bear on such situations and which in some cases pull in different directions: students and staff are entitled to work and live in a safe and secure environment, free from anxiety, fear, intimidation and harassment; they are also entitled to freedom of speech and to pursue political, religious and other action within the law.

Universities are committed by their charters or other instruments of government, their missions and by the law to the principles of free inquiry and of free speech within the law.

These principles mean that vigorous debate is perfectly proper and acceptable and universities must therefore be tolerant of a wide range of views and opinions on social, economic, political and religious issues, however unorthodox, unpopular, uncomfortable, controversial or provocative.

But any action, publication or speech must be lawful: racial or sexual discrimination and incitement to racial hatred are therefore proscribed, as is any other action, publication or speech forbidden by law.

These principles give rise to an *obligation* on members of universities individually and in groups to respect other members and groups and not to interfere in or seek to hamper or curtail the legitimate activities or affairs of other individuals or groups. This mutual respect is fundamental in a university community and confers *rights* on members of the university to be able to conduct their affairs free from unlawful or improper interference.

Universities therefore have a *duty* to give effect to, to enforce and to

promote these principles, rights and obligations in order to ensure for their members—staff and students—both free speech and freedom from intimidation, harassment and fear.

To these ends, universities should use their disciplinary codes, procedures, other rules and regulations and general powers, or refer to the appropriate authorities, so as—

- to protect free speech within the law;
- to protect their staff and students from discrimination and harassment, whether sexual, racial, political, religious or personal;
- to protect their staff and students from any action which intimidates or gives reasonable cause to be fearful, anxious or threatened; and
- to act firmly against violence and the threat of violence, disorder and breach of the peace and any other unlawful action.⁷

What makes a law school ethical in this respect is to have in place rules which express the values of harmony, tolerance, and free speech and to be quick to protect those values when they are threatened.

With regard to interpersonal relationships, we all have rules and procedures dealing with harassment and discrimination. Our codes of discipline cover interferences of various kinds with other individuals, including sexual assault. This is a particularly difficult area, and I chaired another national committee dealing with this which made a series of recommendations adopted by most British universities.⁸

Then there is the problematic issue of sexual relationships between faculty and students. No consensus on this has emerged. Whereas doctor–patient and high school teacher–student relationships (which I acknowledge are not identical) are universally proscribed, sometimes by the criminal law,⁹ professor–student relationships are either regarded as permissible or only mildly disapproved. My own view is that they are wrong and unethical on the part of the professor. Most institutions, at least in Europe, prefer reticence on this subject. Not so for one of the Colleges in my own University, the Royal Academy of Music—one of the foremost conservatories in the world—which has a Code of Conduct concerning Personal Relationships. The Code begins:

Although staff and students at the RAM are regarded as capable of making mature sexual decisions, members of staff are strongly advised

7. Committee of Vice-Chancellors and Principals, *Extremism and Intolerance on Campus* 6-9 (London 1998).

8. Committee of Vice-Chancellors and Principals, *Student Disciplinary Procedures: Notes of Guidance* (London 1994).

9. As in the U.K.: see the Sexual Offences (Amendment) Act 2000, ch. 44, §§ 3(1), 4(5).

not to enter into a sexual relationship with a student for whom they are educationally or pastorally responsible, or for whom they provide administrative or technical support. In such circumstances, consent may not be as freely given as it appears; similarly, equality within a relationship where one party has educational or administrative responsibility over another is frequently more apparent than real.¹⁰

The teaching of students at somewhere like the Royal Academy of Music is particularly personal and intense. Much of it is one-to-one. In addition, as in a law school, there are professional opportunities, since the professors are also practising musicians. The *raison d'être* of the Code "is to ensure that individual members of staff do not cause a conflict of interests, commit an act of impropriety, abuse the authority vested in them, or show bias."¹¹ If a relationship does develop, it must be reported to the administration. All institutions should have guidance on this difficult area.

D. Ethical in the Standards of Non-academic Behaviour

The law school authorities must ensure that any irregularity or impropriety in a non-academic context is dealt with effectively. For example, downloading unlawful material from the internet; fraudulent expenses claims; irregularities in student societies: the law school must take seriously any allegations of unethical or improper behaviour in areas such as these and recognise that they require firm and decisive action. A law school that was uninterested in or relaxed about, say, fraudulent expense claims or misuse of research funds would be seriously failing in its own ethical responsibilities and would not meet the test of the ethical law school.

E. Ethical in the Way the Law School Conducts Its Business

It goes without saying that the school must act in accordance with the governing rules of the university of which it is a part and of any rules, regulations and procedures prescribed by the university for the school or introduced by the school for itself. It falls primarily to the dean and the senior administrators to ensure that these procedures are observed. They make for constancy and regularity in the affairs of the school, and it would be ironic if a law school of all places were to be careless of its constitutional procedures. Ethical standards will arise also in connection with law school recruitment and publicity material.

Coupled with this should be formal procedures for the ventilation of complaints and for whistleblowing—procedures which command the confidence of the community as a whole, of those who are complaining and of the wider public. Whether the law school is part of a public institution or private makes no difference: all in a sense have public responsibilities or accountabilities. In

10. *Code of Conduct concerning Personal Relationships at the Royal Academy of Music* (R.A.M., London).

11. *Id.*

Britain, it is now generally accepted that mechanisms of these kinds should at some stage involve an external element.¹²

I have already said that the primary responsibility for ensuring compliance with prescribed procedures falls on the senior administrators, but I need to go further. For the law school to be ethical, its dean and his or her senior colleagues must themselves conduct the school's business and affairs in ways that are scrupulously honest, transparent wherever possible, involve full participation by colleagues and are in all respects above reproach. The dean of a law school, like the president of a university or the chief executive of a corporation, sets the tone and style of the school and articulates and personifies its values. He or she, and the team which he or she leads, have an indispensable role in creating, promoting and sustaining a culture of ethics without which the law school is unlikely to merit the description ethical.

F. Ethical in a Broader Social Context

This is a more difficult area because it inevitably involves issues which are not themselves straightforward or wholly free of controversy. Law schools, like any other bodies, should be alive to their impact on the environment. There are issues about an ethical investment policy (assuming the law school's endowment funds are subject to the control of the school rather than the university). The Universities Superannuation Scheme, with assets of almost \$30 billion, is Britain's third largest private sector pension fund and has recently come under intense pressure from the university community to adopt an ethical or socially responsible investment policy. There can be difficult issues in relation to accepting funds from outside persons or bodies. I give just two examples. The first concerns money from tobacco sources. I take the view, not universally shared, that money should be accepted if the terms are otherwise acceptable, if it comes from a lawful source, is intended for a proper purpose and is not designed to further the interests of a questionable donor. I therefore oppose the efforts of the cancer research charities in the UK to bring pressure to bear on universities to reject all money from tobacco companies.¹³ At least two of our leading universities have attracted widespread criticism for accepting "tobacco money" even in areas far away from tobacco-related research. Is it improper for government to tax so heavily this lucrative trade and use the revenue—some \$15 billion a year in the U.K.—for the public good? Secondly, there was much controversy when the University of Oxford decided to accept a substantial gift from the grandson of a man whose company employed slave labour in Germany during the Nazi era and had paid little or no compensation. There are also difficult issues relating to policies on the admission of students: to what extent should institutions discriminate positively in favour of ethnic minority candidates or those from disadvantaged socioeconomic groups?

12. See Committee of Vice-Chancellors and Principals, *Independent Review of Student Appeals and Complaints* (London 1998).

13. See, e.g., Cancer Research UK, *Preventing Lung Cancer: Isolating the Tobacco Industry*, Consultation Document (London 2002).

On all these matters, views may legitimately differ. What is important is that they are resolved in ways that are open and fair and in which the competing moral imperatives are duly weighed. A law school is entitled to reach a decision which it suspects will attract public criticism, but only if it has given proper consideration to the matter and is able to support its conclusion in a reasoned way that demonstrates its awareness of the ethical dimensions.

II. WHAT CAUSES UNETHICAL BEHAVIOUR?

Without the necessary rules, procedures and protocols in place, unethical practices are, if not inevitable, at least much more likely. These not only set the standards and sensitise the school community, but also provide for appropriate consideration of issues. Of course, lack of personal integrity will lead to unethical behaviour, but I have encountered very little of that throughout my career, except, sadly and inexplicably, among clinical academics.

Unethical behaviour arises less often from rank dishonesty or lack of integrity than from other deficiencies. For example, there may be an inertia on the part of those administrators who ought to deal with a matter, feeling it to be a distraction from more pressing commitments. There is the assessment that to take action will only lead to publicity which would have a damaging impact on the school and its reputation. There is the psychology of those—and it is not uncommon—who recoil from confrontations and difficult or emotionally charged situations. And there is the failure truly to comprehend the nature and quality of the issue at hand. All these I would characterise as manifestations of “ethical illiteracy” or insensitivity. The president who failed to recognise the import of the young law professor who claimed a postgraduate law degree he had never earned was not so much lacking in personal integrity as ethically insensitive or illiterate. Likewise the professor who sat on a committee which selected the members of a board to consider his own wife’s promotion. The conflict of interest and the impropriety of his participation in that discussion did not even occur to him. Professors who write unduly favourable references for their former students are not truly dishonest, but they are surely ethically illiterate.

EPILOGUE

Universities, in my experience, are among the most ethical of organisations; and my experience of law schools in particular convinces me that we have much of which we can be proud in the ethical arena. I have no doubt that will continue to be true in both our countries, but no law school, however successful, respected and prestigious, will be immune from the unethical unless it adopts the practices I have described above as well as generating a constant and pervasive climate of ethical literacy throughout the school.

The ethical law school will command the confidence and respect of the scholarly community and the legal profession, and will be able more effectively to fulfil its mission in teaching new generations of lawyers, in deepening our understanding of the law, in contributing to the workings of the justice system and in its dual and demanding roles within the academy and the legal profession.

NOTES

THE FHAA'S REASONABLE ACCOMMODATION & DIRECT THREAT PROVISIONS AS APPLIED TO DISABLED INDIVIDUALS WHO BECOME DISRUPTIVE, ABUSIVE, OR DESTRUCTIVE IN THEIR HOUSING ENVIRONMENT

JENNIFER L. DOLAK*

INTRODUCTION

The challenge to stop discrimination and integrate America's disabled individuals into mainstream housing is an ongoing quest.¹ Congress first attempted to protect disabled people with the Rehabilitation Act of 1973.² In 1988, the Fair Housing Act (FHA)³ was amended by the Fair Housing Amendments Act (FHAA) to include disabled individuals in the group of persons protected from discrimination in the sale or rental of housing.⁴ The Americans

* J.D. Candidate, 2003, Indiana University School of Law—Indianapolis; B.S., 1995, Indiana University, Bloomington, Indiana. I would like to thank Professor Florence Wagman Roisman for her guidance during the writing of this Note.

1. The National Council on Disability (NCD) issued a report in 2001 focusing on administrative enforcement of Section 504 of the Rehabilitation Act and the Fair Housing Act (FHA) by the Department of Housing and Urban Development (HUD). The report indicates that HUD has failed to adequately enforce civil rights laws and states, "the promises of the fair housing laws have been empty for many Americans, with and without disabilities." NAT'L COUNCIL ON DISABILITY, RECONSTRUCTING FAIR HOUSING 3 (2001), *available at* <http://www.ncd.gov/newsroom/publications/01publications.html>. Further, the report states:

Without effective and fair enforcement of civil rights laws, people who are injured by housing discrimination lack recourse to remedies and rights that Congress passed in an express effort to achieve a country free from invidious discrimination. And without effective and fair enforcement of civil rights laws tied to increased education about those laws, people cannot know the ways in which discrimination may occur so they can avoid discriminating, and those that perpetrate discrimination will not be held accountable for their unlawful actions.

Id. at 3-4.

2. Section 504 of the Rehabilitation Act prohibits discrimination against otherwise qualified individuals with disabilities in any program receiving federal financial assistance. Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794(a) (2000).

3. The Fair Housing Act is the short title for Title VIII of the Civil Rights Act of 1968.

4. Fair Housing Amendments Act of 1988, § 6, 42 U.S.C. § 3604(f) (1994 & Supp. V

with Disabilities Act (ADA) was enacted in 1990 and further prohibited discrimination on the basis of disability in such areas as employment and public services.⁵

Under the FHA, a disabled individual can bring a claim against a party under any of three theories: intentional discrimination, disparate impact, or failure to make reasonable accommodation as required by 42 U.S.C. § 3604(f).⁶ This Note will focus on reasonable accommodation claims by individuals who have disabilities that cause disruptive, abusive, or destructive behavior in their housing environment.

Although many years have passed since the enactment of the FHAA in 1988, there has been and continues to be much litigation regarding reasonable accommodations. This litigation has resulted in the general acceptance of certain kinds of reasonable accommodations, such as the waiver of zoning and other land use restrictions to allow for group homes in areas zoned for single-family use only,⁷ the allowance of assistance animals for disabled individuals in buildings with no-pets policies,⁸ and the reservation of parking spaces close to the building for use by disabled residents.⁹ As these areas of reasonable accommodation law have become generally settled, other problematic areas have emerged and

1999)).

5. Americans with Disabilities Act, 42 U.S.C. § 12101 (1994 & Supp. V 1999).

6. See ROBERT G. SCHWEMM, HOUSING DISCRIMINATION §§ 10.1, 11.5(4) (1990 & Supp. 1996).

7. The House Judiciary Committee made its intentions clear regarding the effect of the FHAA on discriminatory zoning practices when it stated, "The Committee intends that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices." H.R. REP. NO. 100-711, at 24 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2185. Even though the Committee plainly set out its intentions, the residents of many communities continue to attempt to circumvent the law by using indirect means to keep group homes out of their neighborhoods. *E.g.*, *Smith & Lee Assocs., Inc. v. City of Taylor*, 102 F.3d 781, 795 (6th Cir. 1996) (municipality required to increase the number of unrelated persons allowed to reside in a dwelling in a neighborhood zoned for single-family use only as an accommodation for a group home for the elderly disabled when such accommodation would not result in the fundamental alteration of the single-family neighborhood). The intention of the House may be clear, but litigation is often required before a group home can be established in a community. See also SCHWEMM, *supra* note 6, § 11.5(3)(c).

8. HUD regulations give as an illustration of action that violates the FHAA's reasonable accommodation provision the following example:

It is a violation of § 100.204 for the owner or manager of [an] apartment complex to refuse to permit [a blind] applicant to live in [an] apartment with a seeing eye dog because, without the seeing eye dog, the blind person will not have an equal opportunity to use and enjoy a dwelling.

24 C.F.R. § 100.204 (2001).

9. *E.g.*, *Jankowski Lee & Assocs. v. Cisneros*, 91 F.3d 891 (7th Cir. 1996); *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328 (2d Cir. 1995).

continue to exist without any clear guidance.¹⁰

One area of law that remains unsettled is what, if any, reasonable accommodation must be made when disabled residents are disruptive, abusive, or destructive in their housing environment. This type of case poses a special problem because, unlike individuals who require a reasonable accommodation for a physical disability, some of the individuals who become abusive, disruptive, or destructive are a direct threat to the health and safety of others. The FHAA includes a direct threat exception to the reasonable accommodation provision and does not require that an accommodation be made if the resident poses a direct threat to the health or safety of others, and the accommodation will not eliminate the nature of the threat.¹¹ Thus, in this type of case, it is necessary to consider both the reasonable accommodation provision and direct threat exception included in the FHAA.

It is not clear how many people become disruptive, abusive, or destructive in their housing environment. However, this is a significant problem for each person who becomes involved in this difficult situation, including the disabled individual, the landlord or housing association (which will be collectively referred to as property manager for purposes of this Note), and other residents. As cases discussed later in this Note will demonstrate, a property manager may lose other residents as a result of the conduct of one disabled resident.¹² This is certainly an incentive for property managers to try to remedy the problem as quickly as possible, but the question becomes: how do they fix the problem?

In almost all of the cases involving disruptive, abusive, or destructive behavior by a resident and reasonable accommodation claims under the FHAA, the behavior was a direct result of some form of mental disability.¹³ The number of cases involving disruptive, abusive, or destructive behavior by residents is small in relation to the number of people that suffer from some form of significant mental disorder every year.¹⁴ However, as the demographics of society change, and a larger percentage of the population becomes older, the potential for this type of situation is greater as larger numbers of people suffer

10. *Cf. Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 300 (2d Cir. 1998) (landlord's refusal to accept disabled tenants eligible for Section 8 housing did not violate the FHA's reasonable accommodation provision because such accommodation would have required a fundamental alteration of rental policies and the imposition of a substantial burden).

11. 42 U.S.C. § 3604(f)(9) (1994 & Supp. V 1999).

12. *See Roe v. Sugar River Mills Assocs.*, 820 F. Supp. 636 (D.N.H. 1993).

13. *See discussion infra* Part II.

14. About nine percent of adults in the United States are affected by significant disorders of mental processes every year. Some disorders may last for only a brief period of time. Disorders are evidenced by such problems as disordered thinking, perceptual difficulties, delusions, hallucinations, mood disturbances, and impairments in social and vocational functioning and in self-care. JOHN PARRY, *MENTAL DISABILITY LAW: A PRIMER* 3 (5th ed. 1995). "Severe mental illnesses, which include schizophrenia, bipolar disorder, and severe depression, affect almost three percent of the adult population per year." *Id.*

from age related mental illnesses such as Alzheimer's disease.¹⁵

Part I of this Note surveys the development of the law protecting disabled people and the relevant legislative history. This section also focuses on the standards that developed from case law interpreting Section 504 of the Rehabilitation Act. The analysis in Part II addresses the major questions raised in cases involving residents who become disruptive, abusive, or destructive in their housing environment. Part II.A addresses the relationship between the reasonable accommodation provision and the direct threat exception and discuss specifically the rights and obligations of property managers and disruptive, abusive, or destructive residents who claim reasonable accommodation protection. Part II.B discusses who should bear the burden of proposing and implementing the accommodation. Part II.C addresses what conduct by a resident amounts to a direct threat, and Part II.D discusses the standards to be used in determining whether an accommodation is appropriate as well as some accommodations that have been used in the past.

I. DEVELOPMENT OF THE LAW, LEGISLATIVE HISTORY, AND STANDARDS REFERENCED BY THE LEGISLATIVE HISTORY

A. *Development of the Law and Legislative History*

The Rehabilitation Act of 1973 was the first attempt by Congress to protect the rights of disabled individuals. The Act prohibits discrimination against otherwise qualified disabled individuals in programs receiving federal financial assistance.¹⁶ The relevant portion of the Act states, "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance"¹⁷ Although the scope of the Act's protection is limited

15. Alzheimer's disease is the most common cause of dementias. This disease is "thought to affect one of every twenty-five persons between the ages of sixty-five and seventy-four years, and nearly one of every two persons eighty-five years old or older." *Id.* at 4. Persons with dementias may have any number of symptoms including "behavioral problems such as wandering and pacing, emotional outbursts, disruptiveness, and aggression." *Id.* at 5. Progressive degenerative diseases like Parkinson's disease, Huntington's disease, Pick's disease, cardiovascular diseases, brain infections, metabolic disorders, and brain tumors may also cause dementias. *Id.*

It is estimated that four million people currently suffer from Alzheimer's disease and that the estimated number of approximately 360,000 new cases each year will continue to increase as the population ages. NATIONAL INSTITUTE ON AGING & NATIONAL INSTITUTES OF HEALTH, 2000 PROGRESS REPORT ON ALZHEIMER'S DISEASE: TAKING THE NEXT STEPS 2-3 (2000), available at <http://www.alzheimers.org/pubs/prog00.htm> (citing R. Brookmeyer et al., *Projections of Alzheimer's Disease in the United States and the Public Health Impact of Delaying Disease Onset*, 88 AM. J. PUB. HEALTH 1337, 1337-42 (1998)).

16. 29 U.S.C. § 794(a) (2000).

17. *Id.*

because it applies only to federal programs, it does have application to housing programs that receive federal financial assistance.

Fifteen years after the enactment of the Rehabilitation Act came the passage of the FHAA, which added handicapped individuals to the class of people protected under the FHA.¹⁸ The FHAA provides much broader protection than the Rehabilitation Act for disabled individuals against discrimination in the sale or rental of housing because it is not limited to programs receiving federal financial assistance. The House Judiciary Committee stated that the purpose of the FHAA, similar to the purpose of Section 504 of Rehabilitation Act of 1973, was to express the:

[N]ational commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream. It repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals. Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion.¹⁹

The House Judiciary Committee indicated that the standards developed by case law under Section 504 of the Rehabilitation Act should apply under the FHA.²⁰ These standards will be discussed further in Part I.B of this Note.

The Fair Housing Amendments Act of 1988 adds the following provision to the FHA, making it unlawful:

(f)(2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of—

(A) that person; or

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that person.²¹

Further, the FHAA provides that discrimination includes “a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.”²²

In addition to the non-discriminatory and reasonable accommodation provisions included in the FHAA, Congress included a “direct threat” exception that is at the center of the discussion in this Note. The direct threat exception states, “Nothing in this subsection requires that a dwelling be made available to

18. Fair Housing Amendments Act of 1988, § 6, 42 U.S.C. § 3604(f) (1994 & Supp. V 1999)).

19. H.R. REP. NO. 100-711, at 18 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179.

20. *Id.* at 25, *reprinted in* 1988 U.S.C.C.A.N. at 2186.

21. Fair Housing Amendments Act of 1988 § 6, 42 U.S.C. § 3604(f)(2).

22. *Id.* § 3604(f)(3)(B).

an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others."²³ Although the Judiciary Committee stated that it did not foresee that a disabled tenant would pose a threat to the health and safety of others simply as a function of being handicapped, the Committee said Congress included the "direct threat" exception to the non-discrimination provisions of the Act in order to allay the fears of "those who believe that the non-discrimination provisions of this Act could force landlords . . . to rent . . . to individuals whose tenancies could pose such a risk."²⁴

B. Standards Referenced by Legislative History

The report of the House Judiciary Committee indicates that the line of decisions involving Section 504 of the Rehabilitation Act should be applied to claims brought under the FHAA.²⁵ The federal circuit and district courts have also recognized that this line of decisions defining the concept of a reasonable accommodation under Section 504 is applicable under the similar provisions of the FHAA.²⁶ This line of cases includes two Supreme Court cases, *Southeastern Community College v. Davis*²⁷ and *School Board of Nassau County v. Arline*.²⁸ In applying these cases to the FHAA the House Report established that:

A discriminatory rule, policy, practice or service is not defensible simply because that is the manner in which such rule or practice has traditionally been constituted. This section would require that changes be made to such traditional rules or practices if necessary to permit a person with handicaps an equal opportunity to use and enjoy a dwelling.²⁹

In addition, the Committee said that Congress drew upon these decisions when it decided to include the direct threat exception. The Committee stated that if a resident poses a direct threat to the health and safety of others in a housing environment, a reasonable accommodation is not required unless it will eliminate the threat.³⁰

23. *Id.* § 3604(f)(9).

24. H.R. REP. NO. 100-711 at 26, *reprinted in* 1988 U.S.C.C.A.N. at 2187.

25. *Id.* at 25, 29, *reprinted in* 1988 U.S.C.C.A.N. at 2186, 2190.

26. *See, e.g.,* *Smith & Lee Assocs., Inc. v. City of Taylor*, 102 F.3d 781, 795 (6th Cir. 1996) ("As several courts have noted, the House Report's numerous references to Section 504 indicate that Congress intended courts to apply the line of decisions interpreting 'reasonable accommodations' in Section 504 cases when applying the FHAA."). *See also* *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450 (D.N.J. 1992).

27. *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397 (1979).

28. *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987).

29. H.R. REP. NO. 100-711, at 25, *reprinted in* 1988 U.S.C.C.A.N. at 2186.

30. *Id.* at 29, *reprinted in* 1988 U.S.C.C.A.N. at 2190. The purpose of including the direct threat exception in the FHAA was to codify the "otherwise qualified" standard as developed by case

The Supreme Court addressed Section 504 of the Rehabilitation Act for the first time in *Davis*.³¹ In *Davis*, an individual suffering from a serious hearing disability brought a claim against Southeastern Community College, an institution receiving federal funds, after she was denied admission to a nursing program because she could not meet certain requirements of that program. According to an audiologist's report, Davis could not understand speech except through lip reading. The college rejected Davis because her "hearing disability made it unsafe for her to practice as a nurse."³² In addition, the college adopted the conclusion that "it would be impossible for [Davis] to participate safely in the normal clinical training program, and those modifications that would be necessary to enable safe participation would prevent her from realizing the benefits of the program."³³

The specific issue addressed by the Court was whether the Act, which "prohibits discrimination against an 'otherwise qualified handicapped individual' in federally funded programs 'solely by reason of his handicap,' forbids professional schools from imposing physical qualifications for admission to their clinical training programs."³⁴ The Court determined that the language of the Act did not require educational institutions to "disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate."³⁵ Rather, the Court concluded that the language of the Act meant that "mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context."³⁶ The Court found that "[a]n otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap."³⁷ Davis was not determined to be an otherwise qualified person entitled to protection under Section 504.³⁸

In reaching its conclusion, the Court used language setting forth the standard that a reasonable accommodation is one that does not require a "fundamental alteration" of the nature of a program or imposition of "undue financial and administrative burdens."³⁹

law in an employment context under Section 504. *Id.* As discussed in *Davis*, handicapped individuals are "otherwise qualified" if, with reasonable accommodation, they can satisfy all the requirements for a position or services. *Davis*, 442 U.S. at 406. This definition is subject to the exception created in *Arline* where the Court held that "[a] person who poses a significant risk . . . to others . . . will not be otherwise qualified . . . if reasonable accommodation will not eliminate that risk." *Arline*, 480 U.S. at 288 n.16.

31. *Davis*, 442 U.S. at 405.

32. *Id.* at 401.

33. *Id.* at 401-02.

34. *Id.* at 400.

35. *Id.* at 405.

36. *Id.*

37. *Id.* at 406.

38. *Id.* at 414.

39. The Court stated, "Whatever benefits [Davis] might realize from such a [modified] course

Arline is a case involving employment discrimination under Section 504 of the Rehabilitation Act. Gene Arline was discharged from her job, teaching elementary school, after suffering a relapse of tuberculosis. The school board stated its reason for terminating Arline's employment as the "continued reoccurrence [sic] of tuberculosis."⁴⁰ The Court concluded that Arline was considered handicapped for purposes of Section 504 and then addressed whether Arline was "otherwise qualified" to teach elementary school.⁴¹ Due to insufficient findings of fact by the district court, no determination was made regarding whether Arline was otherwise qualified to teach elementary school. However, the Supreme Court did set forth a standard: "[a] person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk."⁴² Additionally, the Court stated that employers do have "an affirmative obligation to make a reasonable accommodation for a handicapped employee."⁴³

The *Arline* standard was incorporated into the direct threat exception under the FHAA.⁴⁴ The House Report stated that "a dwelling need not be made available to an individual whose tenancy can be shown to constitute a direct threat and a significant risk of harm to the health or safety of others."⁴⁵ However, "[i]f a reasonable accommodation could eliminate the risk," the accommodation must be made.⁴⁶

The Committee said that a direct threat could only be shown through evidence of overt acts. Specifically, the House Report stated:

Any claim that an individual's tenancy poses a direct threat and a substantial risk of harm must be established on the basis of a history of overt acts or current conduct. Generalized assumption, subjective fears, and speculation are insufficient to prove the requisite direct threat to others. In the case of a person with a mental illness, for example, there must be objective evidence from the person's prior behavior that the

of study, she would not receive even a rough equivalent of the training a nursing program normally gives. Such a *fundamental alteration* in the nature of a program is far more than the 'modification' the regulation requires." *Id.* at 410 (emphasis added). Additionally, the Court writes, "[Technological] advances also may enable attainment of these goals without imposing *undue financial and administrative burdens* upon a State." *Id.* at 412 (emphasis added). *See also* Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 288 n.17 (1987).

40. *Arline*, 480 U.S. at 276.

41. *Id.* at 281, 287.

42. *Id.* at 287 n.16.

43. *Id.* at 289 n.19.

44. The Committee stated, "While *Arline* dealt with employment in the context of Section 504, the Committee intends that same standard to apply in the context of housing under [the FHAA]." H.R. REP. NO. 100-711, at 29 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2190.

45. *Id.*

46. *Id.*

person has committed overt acts which caused harm or which directly threatened harm.⁴⁷

Thus, a property manager may determine that a person is a direct threat based only on that person's prior conduct. A property manager is given limited room to determine whether an applicant poses a direct threat by asking certain questions. However, the same questions must be asked of all applicants and not just those applicants the property manager suspects may have a disability.⁴⁸

HUD regulations make it unlawful for a property manager to ask applicants about their own handicaps or any person associated with that applicant's handicap.⁴⁹ However, the regulations do permit certain inquiries regarding an applicant's ability to meet the requirements of ownership or tenancy and the sale or use of drugs, provided that these inquiries are made of all applicants.⁵⁰ Applicants, in addition to being asked about prior landlords and references, can be asked "whether the applicant's tenancy poses a direct threat to the health or safety of other individuals or would result in substantial physical damage to the property."⁵¹ But, if a reasonable accommodation would eliminate the risk, the property manager would still be required to make one.⁵²

II. ANALYSIS OF THE MAJOR QUESTIONS RAISED IN CASES INVOLVING ABUSIVE, DISRUPTIVE, OR DESTRUCTIVE RESIDENTS

A. The Relationship Between the Duty to Reasonably Accommodate and the Direct Threat Exception

1. Must Reasonable Accommodations Be Attempted When a Resident Poses a Direct Threat?—The FHA states that a property manager must "make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a disabled] person equal opportunity to use and enjoy a dwelling."⁵³ However, the unique problem that is illustrated by the cases discussed in this section, involving residents who are disabled and become disruptive, abusive, or destructive, is determining the

47. *Id.* (footnote omitted).

48. ROBERT M. LEVY & LEONARD S. RUBENSTEIN, *THE RIGHTS OF PEOPLE WITH MENTAL DISABILITIES* 185 (1996).

49. The HUD regulations state, "It shall be unlawful to make an inquiry to determine whether an applicant for a dwelling, a person intending to reside in that dwelling . . . or any person associated with that person, has a handicap or to make an inquiry as to the nature or severity of a handicap of such person." 24 C.F.R. § 100.202(c) (2001).

50. *Id.*

51. LEVY & RUBENSTEIN, *supra* note 48, at 185. HUD regulations state, "Nothing . . . requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others." 24 C.F.R. § 100.202(d).

52. H.R. REP. NO. 100-711, at 29 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2190.

53. 42 U.S.C. § 3604(f)(3)(8) (1994 & Supp. 1999).

relationship between the duty of a property manager to make reasonable accommodations and the direct threat exception.

Whether a property manager must attempt to reasonably accommodate a resident posing a direct threat is a question that several district courts have answered. A property manager must attempt to reasonably accommodate a resident posing a direct threat and show that no reasonable accommodation will sufficiently reduce the nature of the threat before the property manager may seek eviction of that resident.⁵⁴ It also appears that a property manager may reach the conclusion that no reasonable accommodation will sufficiently reduce the nature of the threat posed by the resident and proceed with eviction;⁵⁵ however, this conclusion cannot be arrived at lightly because if not supported by an adequate foundation, it is not likely to hold much weight in court.

Several additional questions raised by these conclusions are addressed in Part II.A.2-3 of this Note. These questions are: how can a property manager demonstrate that no accommodation will sufficiently reduce the nature of the threat posed by a resident? and what "attempts" to reasonably accommodate a resident are sufficient?

Roe v. Sugar River Mills Associates addressed the relationship between the duty to reasonably accommodate and the direct threat exception. The court concluded that the standards established in the context of Section 504 of the Rehabilitation Act were determinative in arriving at the conclusion that a property manager must first attempt to reasonably accommodate a disabled resident who poses a direct threat and then demonstrate that no reasonable accommodation will sufficiently reduce the nature of the threat before a property manager can proceed with an eviction.⁵⁶

In *Sugar River Mills*, the plaintiff, James Roe, who suffered from a mental illness, threatened an eighty-two-year-old resident of Sugar River Mills with physical violence and used "obscene, offensive and threatening language."⁵⁷ Roe's behavior on one occasion led to his conviction for disorderly conduct. The threatened tenant gave notice to vacate the premises. Sugar River Mills threatened to evict Roe based on his conduct, and Roe filed a claim against Sugar River Mills under the FHA. The court denied a motion for summary judgment for the defendant apartment complex.⁵⁸

Sugar River Mills argued that it was not required to make any attempt to reasonably accommodate Roe because, pursuant to 42 U.S.C. § 3604(f)(9), Roe's conviction for disorderly conduct clearly indicated he was a "direct threat to the health or safety of other individuals."⁵⁹ Roe argued that his conduct was a direct result of his mental handicap and thus, Sugar River Mills could evict him under

54. See *Roe v. Hous. Auth. of Boulder*, 909 F. Supp. 814, 822-23 (D. Colo. 1995); *Roe v. Sugar River Mills Assocs.*, 820 F. Supp. 636, 640 (D.N.H. 1993).

55. See *Arnold Murray Constr., L.L.C. v. Hicks*, 621 N.W.2d 171, 175 (S.D. 2001).

56. *Sugar River Mills Assocs.*, 820 F. Supp. at 640.

57. *Id.* at 637.

58. *Id.* at 640.

59. *Id.* at 638 (quoting 42 U.S.C. 3604(f)(9) (1992 Supp.)).

the exception only if he continued to be a threat to the safety of others after Sugar River Mills had attempted to reasonably accommodate his handicap.

The court ultimately agreed with Roe based on the legislative history of the FHAA, which indicated that the House Judiciary Committee intended that courts should apply the standard set out in *School Board of Nassau County v. Arline*.⁶⁰ In *Arline*, the Court stated that an employer must attempt to reasonably accommodate an employee with tuberculosis by minimizing the risk to other employees, so long as the employee was "otherwise qualified" to retain her position.⁶¹ The excerpt from the House Report that the court relied on in applying the *Arline* standard to the provisions of the FHA stated that although housing need not be made available to a person whose residency "can be shown to constitute a direct threat and a significant risk of harm to the health and safety of others, [i]f a reasonable accommodation could eliminate the risk, entities covered under this Act are required to engage in such accommodation."⁶² The *Sugar River Mills* court held that "the Act requires [the property manager] to demonstrate that no 'reasonable accommodation' will eliminate or acceptably minimize the risk . . . to other residents."⁶³ The court left open the question of "whether any 'reasonable accommodation' would in fact permit [the] plaintiff to live, peaceably and safely, among the other tenants at Sugar River Mills."⁶⁴ The court offered no suggestion as to which party had the burden to suggest an accommodation.

Other jurisdictions have adopted the rationale used in *Sugar River Mills*. *Roe v. Housing Authority of Boulder*⁶⁵ involved facts similar to *Sugar River Mills*.⁶⁶ Roe, an elderly man suffering from a bipolar disorder, was threatening and abusive towards other tenants. The behavior culminated in an incident in which Roe struck another tenant, who required medical treatment as a result. The landlord sought to evict Roe. The court dismissed a motion for summary judgment by the landlord and held that "assuming Roe is handicapped or disabled, before he may lawfully be evicted [the housing authority] must demonstrate that no 'reasonable accommodation' will eliminate or acceptably minimize any risk Roe poses to other residents at [the housing complex]."⁶⁷

While these cases held that a property manager must attempt to reasonably accommodate a resident who poses a direct threat, these courts provided no guidance regarding what attempts may be sufficient or how a property manager can "demonstrate" that no accommodation will reduce the nature of the threat.⁶⁸

60. *Id.* at 639.

61. *Id.* (citing *Sch. Bd. of Nassau County v. Arline*, 280 U.S. 273, 287-88 (1987)).

62. *Id.* at 640 (citing H.R. REP. NO. 100-711, at 29 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2190) (emphasis added)).

63. *Id.* (emphasis added).

64. *Id.*

65. 909 F. Supp. 814 (D. Colo. 1995).

66. *Id.* at 822.

67. *Id.* at 822-23 (emphasis added).

68. As the court in *Sugar River Mills* stated, there is a question "whether any 'reasonable

The courts' interpretation of the FHAA, while focused on the policy aim established by Congress to protect individuals with disabilities, establishes a difficult standard for a property manager to meet. In order for the property manager to "demonstrate that no reasonable accommodation" will minimize the risk, the property manager faces the extreme difficulty of trying to prove that an unknown, and perhaps infinite, number of potentially reasonable accommodations will not work.

2. *How Can a Property Manager Demonstrate That No Reasonable Accommodation Will Alleviate the Nature of a Direct Threat Posed by a Resident?*—The court in *Arnold Murray Construction, L.L.C. v. Hicks*, which adopted the holding of *Sugar River Mills*, offers some guidance on how a property manager could demonstrate that no reasonable accommodation would alleviate the nature of the direct threat.⁶⁹ In this case, Hicks, a tenant of Arnold Murray Construction (AMC), suffered from a brain injury that caused, among other effects, uncontrollable emotional outbursts. Hicks engaged in threatening and abusive conduct towards other tenants on a number of occasions. This behavior included yelling profanities, staring and screaming at neighbors, and appearing nude in the presence of other tenants. As a result of this conduct, other tenants said they were fearful for their safety. AMC began eviction proceedings against Hicks. Hicks raised a defense, asserting that he was entitled to reasonable accommodation of his handicap under the FHAA before AMC could evict him.⁷⁰

The trial court concluded that Hicks did pose a direct threat to the health and safety of other tenants and "because AMC had shown that no reasonable accommodation would eliminate or acceptably diminish the risk Hicks posed, AMC was not required to show that a reasonable accommodation had been made."⁷¹ Hicks argued on appeal that before he could be evicted, AMC must first attempt to reasonably accommodate his disability.⁷² The South Dakota Supreme Court rejected this argument and upheld the trial court's finding that no reasonable accommodation would diminish the threat Hicks posed and that once AMC made this determination it was under no further obligation to attempt to accommodate Hicks.⁷³

In making its decision, the court looked at the legislative history of the FHAA, as well as the decisions in *Sugar River Mills* and *Housing Authority of Boulder*.⁷⁴ The court agreed with the outcome of both of these cases; however, the court added, "[w]e do not believe that Congress intended accommodations to be attempted or implemented if there is no reasonable expectation that the

accommodation' would in fact permit plaintiff to live, peaceably and safely among the other tenants at Sugar River Mills." *Sugar River Mills Assoc.*, 820 F. Supp. at 640.

69. *Arnold Murray Constr., L.L.C. v. Hicks*, 621 N.W.2d 171, 175 (S.D. 2001).

70. *Id.* at 173.

71. *Id.*

72. *Id.* at 174.

73. *Id.* at 174, 176.

74. *Id.* at 174-75.

accommodation will protect the other tenants.”⁷⁵ The court stated that once “the landlord shows that no reasonable accommodation will curtail the risk, its duty to accommodate ceases.”⁷⁶

The conclusion that no accommodation would alleviate the risk was based on the testimony of the property manager and the tenant. The property manager, who according to the court had extensive experience dealing with the challenges faced by residents with disabilities, testified that “she did not believe any reasonable accommodation would reduce the risks posed by [the tenant].”⁷⁷ Although the court did not specifically state that the tenant had the burden of suggesting a reasonable accommodation, the court noted that the tenant failed to counter the property manager’s testimony with any testimony of his own suggesting that there was an accommodation that would alleviate the risk presented by his conduct.

The result in *Hicks* is consistent with the congressional policy of integrating people with disabilities into mainstream society while at the same time considering the needs of property managers and neighboring residents. The landlord does not have to needlessly attempt to accommodate a resident if there is truly nothing that can be done to reduce the nature of the threat posed by the disabled resident. As the trial court stated in *Hicks*, “to require an ‘automatic attempt to accommodate a dangerous tenant would needlessly place other residents in the tenant’s building at risk.’”⁷⁸

A danger of relying on testimony by a property manager that no reasonable accommodation will alleviate the risk is that the testimony is not necessarily reliable. Property managers have an incentive to say that they have made every effort to accommodate a resident and that no such accommodation exists because presumably a property manager will want to be rid of a resident who is causing problems. This desire to be relieved of a problem resident may encourage property managers to quickly conclude that no reasonable accommodation can be made, and, thus, they are not required to attempt any accommodation when, in fact, an accommodation could possibly alleviate the threat.

Beyond involving someone experienced with dealing in the special needs of handicapped residents as a property manager, the court in *Hicks* offers no insight regarding other ways a property manager might successfully show that no reasonable accommodation would sufficiently reduce the risk posed by a resident. Property managers with no experience in dealing with these special needs face a difficult situation. One option would be to hire or consult with someone with experience in this area. For a property manager with a large number of residents to manage and the financial resources to do so, it may be well worth the expense to obtain the expertise of someone experienced in dealing with the special needs of handicapped residents. However, this may put an undue financial burden on a property manager with a small number of residents to

75. *Id.* at 175.

76. *Id.*

77. *Id.* at 176.

78. *Id.* at 175.

manage and limited financial resources. Regardless of the property manager's financial resources, this additional cost will ultimately be passed on to all residents, who may not have the financial resources to meet the increased cost of housing.

A more balanced solution is for property managers to work with residents and their physicians or social workers to develop an appropriate accommodation. Proposed accommodations can be evaluated in light of the standards enunciated in *Davis* regarding "fundamental alteration" and the imposition of "undue financial and administrative burdens."⁷⁹ After such interaction, the property manager should have a rational basis for concluding whether any of the proposed accommodations will alleviate the nature of the risk and whether the accommodations are reasonable in light of the *Davis* standards. An accommodation that will fix the problem will save both the property manager and resident from litigation. However, even if the matter proceeds to litigation, this interaction provides a property manager with a basis to testify in court that there is no reasonable accommodation that will acceptably reduce the nature of the risk.

An interactive process can produce beneficial results, but several circuit courts have held that engaging in an interactive process is not mandatory under the FHA. The Sixth Circuit has stated that unlike the employer/employee relationship, where some courts have imposed an obligation to engage in an interactive process based on ADA regulations,⁸⁰ no such duty to engage in an interactive process with a resident by the property manager is required by the "language in the Fair Housing Act or in the relevant sections of the Department of Housing and Urban Development's implementing regulations."⁸¹ Similarly, in a zoning case, the Third Circuit declined "to extend the 'interactive process' requirement that exists in the employer-employee context of the Rehabilitation Act to the housing and land use context of the FHAA."⁸²

Although an interactive process may not be required under the current law, it is also certainly not prohibited. Residents and property managers who reject the use of the interactive process simply because it is not required by law overlook the positive results that will be achieved if the resident and property

79. *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397 at 410, 412 (1979); *see also* *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 288 n.17 (1987). HUD draws upon this language in its comments to 24 C.F.R. § 100.204 when it states, "A housing provider is required to make modifications in order to enable a qualified applicant with handicaps to live in the housing, but is not required to offer housing of a fundamentally different nature." Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232, 3249 (Jan. 23, 1989).

80. ADA regulations state, "To determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the [employee] with a disability in need of the accommodation." 29 C.F.R. § 1630.2(o)(3) (2002).

81. *See Groner v. Golden Gate Gardens Apartments*, 250 F.3d 1039, 1047 (6th Cir. 2001); *see also* *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment of the Township of Scotch Plains*, 284 F.3d 442 (3d Cir. 2002).

82. *Lapid-Laurel, L.L.C.*, 284 F.3d at 446.

manager are able to arrive at a workable accommodation. One such positive result is that the parties avoid litigation, which would reduce the financial impact to either party. The most important result is that residents, who are likely to have a difficult time finding new housing, are not forced to move from their homes.

3. *What Attempts by a Property Manager to Reasonably Accommodate a Resident Posing a Direct Threat Are Sufficient?*—The question of what attempts by a property manager to make reasonable accommodations for a resident are sufficient is not a question that has been clearly answered by the courts. From the standards laid down by the Supreme Court in *Davis*, it is established that a property manager is not required to make a reasonable accommodation that involves a “fundamental alteration” of the nature of a program or imposes “undue financial and administrative burdens.”⁸³ It does not appear that most of the courts dealing with cases involving residents who pose a direct threat have taken these standards into consideration.

Groner v. Golden Gate Gardens Apartments demonstrates what attempts by a property manager to reasonably accommodate a resident are sufficient.⁸⁴ In this case, Groner, who suffered from schizophrenia and depression, allegedly disrupted the sleep of his upstairs neighbor by screaming and slamming doors in his apartment throughout the night. After the apartment manager received complaints about Groner's conduct, she contacted his social worker to inform him of the problem. From the time of the first complaint, numerous additional complaints were submitted to the apartment manager, and periodically these complaints were reported to the social worker. Although the social worker began working with Groner to resolve the problem, the disturbances continued.⁸⁵

Golden Gate, in an attempt to alleviate the problem, soundproofed the front door to Groner's apartment and offered the neighbor the opportunity to move to a different apartment within the complex or to terminate her lease without penalty. The neighbor refused Golden Gate's offer, citing as her reason for refusal the unfairness of expecting her to move to resolve the problem caused by Groner.⁸⁶ When Groner's year-to-year lease expired, Golden Gate refused to renew it and instead made Groner a month-to-month tenant. After the complaints persisted, Golden Gate informed Groner his month-to-month lease was not being renewed and that he must vacate. The social worker requested an extension for Groner as an accommodation and Golden Gate agreed.⁸⁷ Additionally, the social worker asked that Groner be provided with a regular twelve-month lease and that he be contacted regarding any additional complaints about Groner. However, after further complaints, Golden Gate informed the social worker that “it would be too burdensome for Golden Gate to continue apprising [the social worker] each time Groner caused a disturbance.”⁸⁸ Groner was evicted and brought suit

83. *Davis*, 442 U.S. at 410, 412; see also *Arline*, 480 U.S. at 288 n.17.

84. 250 F.3d at 1041-43.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 1042.

under the FHA. The district court granted summary judgment in favor of Golden Gate; Groner appealed.⁸⁹

In upholding the lower court's decision, the Sixth Circuit Court of Appeals stated:

Because Golden Gate has a legitimate interest in ensuring the quiet enjoyment of *all* of its tenants, and because there has been no showing of a reasonable accommodation that would have enabled Groner to remain in his apartment without significantly disturbing another tenant, Groner has failed to raise a genuine issue of material fact as to a violation of his rights under . . . the Fair Housing Act⁹⁰

In his appeal, Groner suggested four possible accommodations. The first suggestion was that his upstairs neighbor move to another apartment. The court rejected this accommodation for several reasons. First, Groner would have likely disturbed any tenant who occupied the upstairs apartment and Golden Gate could not lawfully force the upstairs neighbor to vacate. Groner next suggested that a "hard of hearing" tenant be placed in the upstairs apartment. However, Groner was unable to show that there were any hard of hearing tenants within the complex. Third, Groner suggested that his social worker be contacted any time a complaint was received. The court rejected this because Golden Gate had already attempted this remedy and it proved to be unsuccessful. Additionally, the court stated that "such an indefinite arrangement, . . . would likely have imposed an undue administrative burden on the Golden Gate staff."⁹¹ Lastly, Groner argued that further soundproofing in his apartment could alleviate the problem. Golden Gate argued that this posed safety concerns and that it would amount to a fundamental alteration not required under the FHA; the court agreed.⁹²

Groner demonstrates what type of extensive attempts to reasonably accommodate a resident may be held sufficient. The decision by the court in *Groner* seems to take into account several factors regarding the measures taken to accommodate the resident. The court considered the duration of the problem. The attempts to accommodate Groner were made over the course of approximately one year. While it may be reasonable to communicate with a social worker regarding a problem a few times, the court recognized that requiring such communications to continue indefinitely imposes an undue administrative burden on the property manager's staff. Likewise, the court acknowledged that giving a resident a lease renewal or lease extension while the resident seeks the appropriate treatment for the conduct causing the disturbance is a reasonable accommodation; however, a property manager is not required to continue these extensions or renewals when the treatment produces no positive change in the situation.⁹³

89. *Id.* at 1043.

90. *Id.* at 1047 (emphasis added).

91. *Id.* at 1046.

92. *Id.* at 1047.

93. *Id.* at 1045-46.

The court also looked at the nature of the conduct. Because of the intensely factual nature of FHA cases, the determination of what is a reasonable accommodation is likely to vary accordingly. Groner's conduct threatened the health of his neighbors by depriving them of sleep. The court recognized the unfairness of allowing the disruptive conduct to continue indefinitely after previous attempts to remedy the problem, occurring over the course of approximately a year, had failed. However, it should be noted that what constitutes a reasonable attempt in this case would not necessarily be the same in a situation where a resident is physically violent towards his neighbors. In the case where a resident becomes physically violent, it would be inherently unreasonable to allow the conduct to continue over any period of time.⁹⁴ Both situations are problematic and require expedient resolution, but the urgency of resolving the situation varies because of the nature of the risk.

Although the court in *Groner* does not explicitly state its reliance on the standards established by the Court in *Davis* and *Arline*, its reasoning for rejecting some of Groner's proposed accommodations uses language from those cases. For example, the court stated that requiring the Golden Gate staff to contact Groner's social worker every time a complaint was received could pose an undue administrative burden on the staff as mentioned in both *Davis* and *Arline*.⁹⁵ The *Davis* standards, as well as the duration of the problem and the nature of the conduct, should all be considered when determining whether a property manager has made sufficient attempts to reasonably accommodate a resident.

B. Who Should Bear the Burden of Proposing and Implementing the Accommodation?

The courts have not consistently answered the question of who bears the burden of proposing and implementing an accommodation that will alleviate the nature of a direct threat. The circuit court in *Groner* stated that the FHA "imposes an affirmative duty upon landlords reasonably to accommodate the needs of handicapped persons."⁹⁶ Does this mean that a property manager is required to bear the entire burden of proposing and implementing an appropriate accommodation, or does this mean that once an appropriate accommodation is proposed by the resident the property manager is under a duty to see that it is implemented? I propose that the latter view is the better one, and the one where a positive result is most likely to be achieved. However, there is authority in support of both positions.

Some courts seemingly suggest that the entire burden is on the property manager. The court in *Roe v. Sugar River Mills* places the entire burden on the property manager to show that no reasonable accommodation will be effective,⁹⁷

94. See *infra* notes 120-22 and accompanying text.

95. *Groner*, 250 F.3d at 1046.

96. *Id.* at 1044 (quoting *United States v. Cal. Mobile Home Mgmt. Co.*, 29 F.3d 1413, 1416 (9th Cir. 1994)).

97. See *supra* note 63 and accompanying text.

which implies that the property manager is responsible for proposing an effective accommodation with no assistance from the resident. This standard, which places a heavy burden on the property manager and seemingly little burden on the resident, is not necessary to be consistent with the language of the FHAA. Neither the language of the FHAA, nor the legislative history indicates that the burden is entirely on the property manager to propose a reasonable accommodation or to show that no reasonable accommodation will be effective. In fact, the exact language of § 3604(f)(3)(B) states that a property manager is required "to *make* reasonable accommodations in rules, policies, practices, or services."⁹⁸ This language does not lend support to a theory that the FHAA's drafters intended that a property manager be responsible for both the proposal and implementation of a reasonable accommodation. Rather, this language indicates that a property manager is responsible for implementing a reasonable accommodation once it has been proposed by the resident.

In *Roe v. Housing Authority of Boulder*, not only did the court conclude that the landlord was responsible for showing that no reasonable accommodation would alleviate the threat posed by the tenant, but the court also dismissed claims by the landlord that he had no knowledge of the tenant's disability because the tenant had failed to inform him.⁹⁹ The court stated that although the tenant had not told his landlord that he suffered from a mental disability, the landlord could develop that knowledge based on the tenant's behavior.¹⁰⁰ This implies that not only is the burden on the property manager to develop and implement the appropriate accommodations, but that the property manager is responsible for assessing whether a resident is in fact suffering from a disability requiring an accommodation. This presents an even more challenging situation for a property manager, who in all likelihood has no medical training. Before any attempt at a reasonable accommodation can be made, the property manager must deduce that a resident is suffering from a disability that entitles the resident to reasonable accommodation protection. This suggests that any property manager wishing to avoid litigation should operate under the assumption that every disruptive, abusive, or destructive resident has a disability and is entitled to reasonable accommodation protection. While all residents should have a right to privacy, it would be reasonable to expect a resident with a disability that causes him to be disruptive, abusive, or destructive to inform the property manager that he is entitled to reasonable accommodation under the provisions of the FHA in order to receive the accommodation which would allow him to remain in his existing housing environment. Making this disclosure to the property manager does not need to involve a disclosure by the resident of the exact nature of the disability.

*Groner v. Golden Gate Gardens Apartments*¹⁰¹ supports the proposition that

98. 42 U.S.C. § 3604(f)(3)(B) (1994 & Supp. V 1999) (emphasis added).

99. 909 F. Supp. 814, 821-23 (D. Colo. 1995).

100. The court stated, "Knowledge of a disability or handicap may be acquired directly, by observation, or from a third party." *Id.* at 821 (citing *Schmidt v. Safeway, Inc.*, 864 F. Supp. 991, 997 (D. Or. 1994)).

101. 250 F.3d 1039 (6th Cir. 2001).

the burden is on the resident to propose an accommodation. In reviewing the case, the circuit court focused its attention on the question of whether the plaintiff or defendant bears the burden of showing that an accommodation is reasonable.¹⁰² This question indirectly addresses who bears the burden of proposing the accommodation, because in order to argue the reasonableness of an accommodation, an accommodation must have first been proposed. In *Groner*, the plaintiff argued that "the burden of proving that a proposed accommodation is not reasonable rests with the defendant."¹⁰³ In addressing this argument, the court stated that this was an issue of first impression for the Sixth Circuit; however, it acknowledged that previously it had stated, "[P]laintiffs bear the burden of demonstrating that the desired accommodation is necessary to afford equal opportunity."¹⁰⁴ In examining cases brought under the Rehabilitation Act in the Sixth Circuit, the court determined that the plaintiff seeking an accommodation must show that it is reasonable. The court cited *Monette v. Electronic Data Systems Corp.*, in which the court stated, "The disabled individual bears the initial burden of proposing an accommodation and showing that that accommodation is objectively reasonable."¹⁰⁵ This statement clearly supports the proposition that the resident is the one who bears the burden of proposing an accommodation.¹⁰⁶

The court concluded, based on precedent in the Sixth Circuit and the weight of other authorities, that the plaintiff does in fact bear the burden of establishing the reasonableness of a proposed accommodation.¹⁰⁷ It follows from this conclusion that if a plaintiff bears the burden of establishing reasonableness at trial, then it is also the plaintiff who bears the burden of proposing the accommodation. Thus, if a property manager states that no accommodation exists, then to be successful in court the resident would have the burden of proposing an accommodation and the burden of establishing that the accommodation is reasonable.

The Third Circuit also supports the proposition that residents have the burden

102. *Id.* at 1044-45.

103. *Id.* at 1044 (quoting *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1103 (3d Cir. 1996)). In *Hovsons*, a nursing home developer brought suit under the FHA after the township refused to grant a variance that would allow a nursing home to be built in an area of the community zoned for residential use only. The court held that "the burden should have been placed upon the Township of Brick to prove that it was either unable to accommodate Hovsons or that the accommodation Hovsons proposed was unreasonable." *Hovsons*, 89 F.3d at 1103.

104. *Groner*, 250 F.3d at 1044 (quoting *Smith & Lee Assocs., Inc. v. City of Taylor*, 102 F.3d 781, 796 n.11 (6th Cir. 1996)).

105. *Id.* (quoting *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1183 (6th Cir. 1996)) (emphasis omitted).

106. According to the court in *Groner*, the Fourth and Fifth Circuits also place the burden of proof on FHA plaintiffs to show that an accommodation is reasonable. *Id.* at 1045 (citing *Bryant Woods Inn, Inc. v. Howard County*, 124 F.3d 597, 603-04 (4th Cir. 1997); *Elderhaven, Inc. v. City of Lubbock*, 98 F.3d 175, 178 (5th Cir. 1996)).

107. *Id.*

of proposing an accommodation.¹⁰⁸ Based on the text of the FHAA and the intent of Congress, the court concluded that “the plaintiff bears the initial burden of showing that the requested accommodation is necessary to afford handicapped persons an equal opportunity to use and enjoy a dwelling, at which point the burden shifts to the defendant to show that the requested accommodation is unreasonable.”¹⁰⁹ Specifically, the court noted that the text of the FHAA evidenced no intent to alter normal burdens from the plaintiff to the defendant. On the element of reasonableness, the court concluded that it was bound to follow its earlier decision in *Hovsons, Inc. v. Township of Brick*,¹¹⁰ in which the court held that the defendant bears the burden of showing that the accommodation is unreasonable. The court indicated that this burden-shifting approach made the most sense from a policy standpoint because the plaintiff is in the best position to show what is necessary to afford an equal opportunity to use and enjoy housing, while the defendant is “in the best position to provide evidence concerning what is reasonable or unreasonable.”¹¹¹

Additionally, under other sections of the FHA the resident is required to request a specific accommodation. The HUD regulations related to § 3604(f)(3)(A), which permits disabled residents to make “reasonable modifications of existing premises,” states, “It shall be unlawful for any person to refuse to permit, at the expense of a handicapped person, reasonable modifications . . . if the *proposed* modification may be necessary”¹¹² These modifications include such things as widening doorways and installing grab-bars in bathrooms.¹¹³ If this same concept is applied to § 3604(f)(3)(B), it would become clear that the disabled resident rather than the property manager bears the burden of proposing an accommodation.

The courts should adopt a uniform standard similar to the one adopted by the Third Circuit, which places the burden on the resident to propose an accommodation and the burden on the property manager to demonstrate that it is unreasonable.¹¹⁴ This is the most reasonable standard for all of the parties involved, because the person with the disability is in the best position to assess what type of accommodation, if any, will successfully reduce the threat posed to other residents. Additionally, a resident is in the position to seek assistance from a social worker or physician that is knowledgeable regarding the resident’s disability. The property manager is in the best position to produce evidence regarding the unreasonableness of an accommodation.

108. *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment of the Township of Scotch Plains*, 284 F.3d 442 (3d Cir. 2002) (plaintiff real estate developer argued that the zoning board’s failure to approve housing for the elderly handicapped violated the FHAA based on a disparate impact and reasonable accommodation claim).

109. *Id.* at 458.

110. *Id.* (citing *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1103 (3d Cir. 1996)).

111. *Id.*

112. 24 C.F.R. § 100.203 (2001) (emphasis added).

113. SCHWEMM, *supra* note 6, at § 11.5(4)(b).

114. *See supra* note 111 and accompanying text.

C. When Does a Resident's Conduct Become a Direct Threat?

There is no bright line rule for when conduct is sufficient to be considered a direct threat because of the intensely factual nature of each case. However, the legislative history of the FHAA does state that the determination that a resident is a direct threat must be based on overt conduct and not mere speculation.¹¹⁵ There are several cases that offer some additional guidance.

The Court in *Arline* suggested some factors that should be taken into consideration when evaluating a direct threat in the context of the employment of a disabled person with a contagious disease. These factors include the duration of the risk and the nature, severity, and likelihood of the potential harm.¹¹⁶ Although the *Arline* Court considered these factors in the context of an employment situation, these factors also provide some helpful guidance in the context of a housing situation. For example, in the case where a resident physically harms another person or threatens to harm another person, the likelihood of harm is great; thus, the conduct poses a direct threat. Additionally, if the conduct is ongoing and poses a health risk to neighbors of the resident (for example, where a resident makes loud noises on a nightly basis, preventing a neighbor from sleeping), then the conduct should also be considered a direct threat. In situations where residents engage in conduct that causes minor damage to their housing unit, the harm does not constitute a direct threat to the health or safety of others.

Courts have held that conduct that is criminal in nature does constitute a direct threat. In *Arnold Murray Construction, L.L.C. v. Hicks*, the tenant engaged in threatening and abusive conduct towards other tenants.¹¹⁷ Hicks had not been convicted of any criminal conduct; however, despite the lack of criminal prosecution, the court arrived at the conclusion that Hicks' behavior "clearly amounts to the criminal activity of disorderly conduct."¹¹⁸ Based on this conduct, the court held that Hicks did pose a direct threat to the health and safety of others.¹¹⁹

*Stout v. Kokomo Manor Apartments*¹²⁰ demonstrates an extreme example of a resident engaging in criminal conduct. In this case, the Indiana Court of Appeals held that certain conduct by a tenant was so egregious that no attempt at reasonable accommodation was necessary.¹²¹ The conduct involved was the alleged molestation of a young tenant by another tenant's son. It is unclear from the facts of the case whether at the time the eviction was sought the boy had been subject to any formal legal proceedings regarding the alleged act of molestation.

115. See *supra* note 47 and accompanying text.

116. Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 288 (1987).

117. 621 N.W.2d 171, 173 (S.D. 2001).

118. *Id.* at 176 n.3.

119. *Id.* at 173.

120. 677 N.E.2d 1060 (Ind. Ct. App. 1997).

121. *Id.* at 165.

The court did not determine whether the tenant that committed the act was in fact disabled, but concluded that it did not matter because the nature of the conduct constituted a direct threat to the health and safety of other individuals.¹²²

Every case is extremely fact-oriented; therefore, analysis of the conduct must be made on a case-by-case basis. However, it seems that conduct that is criminal in nature is likely to be considered enough to constitute a direct threat to the health and safety of others. Conduct that falls short of criminal conduct should be evaluated in light of the factors discussed in *Arline*: the duration of the risk and the nature, severity, and likelihood of the potential harm.¹²³

D. What Type of Accommodations Are Appropriate?

The type of accommodation that will be appropriate in any situation will depend on the unique facts of that particular situation. There is no clear standard for determining the appropriateness of an accommodation.¹²⁴ However, statutory language and case law offer some guidance.

The language of § 3604(f)(3) states that an accommodation must be both “reasonable” and “necessary to afford [a person with a handicap] equal opportunity to use and enjoy a dwelling.”¹²⁵ In its discussion of the concept of necessity, the Seventh Circuit stated it requires “at a minimum the showing that a desired accommodation will affirmatively enhance a disabled plaintiff’s quality of life by ameliorating the effects of the disability.”¹²⁶

Additionally, the standards laid down by the Supreme Court in *Davis* establish that a reasonable accommodation is one that does not require the “fundamental alteration” of the nature of a program or impose “undue financial

122. *Id.*

123. *Sch. Bd. of Nassau County v. Arline*, 280 U.S. 273, 288 (1987).

124. *See Hovsons v. Township of Brick*, 89 F.3d 1096, 1104 (3d Cir. 1996) (court stated, “We acknowledge that precisely what the ‘reasonable accommodations’ standard requires is not a model of clarity”); *see also* Daniel Barkley, *The Meaning of Reasonable Accommodation*, 6 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 249, 251 (1997).

125. The provision states that discrimination includes “a refusal to make *reasonable* accommodations in rules, policies, practices, or services, when such accommodations may be *necessary* to afford such person equal opportunity to use and enjoy a dwelling.” 42 U.S.C. § 3604(f)(3) (1994 & Supp. V 1999) (emphasis added). These are almost identical to the requirements cited by the Supreme Court in *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001), for determining the appropriateness of a modification under the ADA. The relevant ADA provision, 42 U.S.C. § 12182(b)(2)(A)(ii), contains language that parallels the accommodation language used in § 3604(f)(3) of the FHA. The Court stated that “the statute contemplates three inquiries: whether the requested modification is ‘reasonable,’ whether it is ‘necessary’ for the disabled individual, and whether it would ‘fundamentally alter the nature of’ the [program].” *PGA Tour, Inc.*, 532 U.S. at 683 n.38. Although the fundamental alteration language is not included in the language under § 3604(f)(3) of the FHA, it is incorporated through the Supreme Court’s decision in *Southeastern Community College v. Davis*. *See infra* note 127 and accompanying text.

126. *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995).

and administrative burdens.”¹²⁷ What constitutes an undue burden is a question left unanswered by the language of the FHA and applicable case law. However, the ADA, which also incorporates a reasonable accommodation provision in its protections against employment discrimination, offers some guidance regarding what amounts to an undue burden under its provisions. The statute codifies the concept of “undue hardship” and lists factors to be considered in evaluating “whether an accommodation would impose an undue hardship on a covered entity.”¹²⁸ This list includes such factors as: the nature and cost of the accommodation, the financial resources of the entity, the size of the entity, the effect on the entity’s expenses and resources, and the impact of an accommodation on the operation of the entity.¹²⁹ Although these factors were drafted for application in an employment context, they are helpful in determining the appropriateness of an accommodation in the housing context.¹³⁰ A number of these factors have been incorporated into the balancing test that some courts use in determining the appropriateness of an accommodation in the housing context.

This balancing test requires an analysis of whether the proposed accommodation provides a benefit to the disabled person that outweighs the burden to the property manager and other residents.¹³¹ *Groner*, unlike many other cases involving disabled residents who are disruptive, abusive, or destructive, incorporates such a balancing test into its analysis of the reasonableness of proposed accommodations.¹³² The court states that generally courts should “balance the burdens imposed on the defendant by the contemplated accommodation against the benefits to the plaintiff.”¹³³ Also, the court states, “In determining whether the reasonableness requirement has been met, a court may consider the accommodation’s functional and administrative aspects, as well as its costs.”¹³⁴

The application of this balancing test to cases in which the resident poses a direct threat may provide some insight. In all of these cases, the benefit to the disabled residents is great; they will be able to continue living in their current housing environment. Conversely, the cost to the property manager and other residents may be quite large. The property manager may lose other residents as

127. *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397 at 410, 412 (1979). *See also Arline*, 480 U.S. at 288 n.17.

128. 42 U.S.C. § 12111(10).

129. *Id.* § 12111(10)(B).

130. Robert J. Aalberts, *Suits to Void Discriminatory Evictions of Disabled Tenants Under the Fair Housing Amendments Act: An Emerging Conflict?*, 33 REAL PROP. PROB. & TR. J. 649, 672-74 (1999).

131. *See Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 303 (2d Cir. 1998); *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995); *Anast v. Commonwealth Apartments*, 956 F. Supp. 792, 801 (N.D. Ill. 1997); *see also Aalberts, supra* note 130, at 669.

132. *Groner v. Golden Gate Gardens Apartments*, 250 F.3d 1039, 1044 (6th Cir. 2001).

133. *Id.*

134. *Id.*

the result of the disruptive, abusive, or destructive resident. These other residents who are forced to move will likely suffer financial loss as a result of moving expenses or increased housing costs. Other residents who do not move may suffer physically or emotionally as a result of living with the disruptive, abusive, or destructive resident. Additionally, the property manager may be required to incur "reasonable costs" to implement an accommodation.¹³⁵ Property managers with limited resources may be unable to handle their routine administrative matters while also trying to work out a solution with a disabled resident.

Courts have generally held that a property manager may be required to incur some costs to implement the accommodation.¹³⁶ However, HUD has promulgated regulations stating that services such as counseling and medical care are not encompassed within this idea; there is no requirement that housing providers offer services such as counseling and medical care.¹³⁷ So what types of reasonable accommodation have been held appropriate in the past?

Different types of accommodation may be appropriate depending on the type of situation. In some situations a property manager can give the disabled resident reasonable time to obtain the appropriate treatment; other disruptive, abusive, destructive behavior can be controlled through the proper use of medication, and in other situations behavior can be modified so that the disabled resident does not disturb neighbors. Where time to receive treatment, compliance with a prescribed course of medication, or behavior modification can reduce the nature of the threat, the accommodation is generally deemed reasonable and does not place an undue burden on the property manager or other residents.

When a mentally ill person's abusive conduct arises from failure to take prescribed medication, the appropriate accommodation may be that continued residence be conditioned upon taking the medication. The use of directly observed therapy may be the appropriate means to ensure that a resident takes the prescribed medication. A failure to abide by this condition, which results in additional instances of disruptive or abusive conduct, would then result in eviction. A limit must be set on how many times this failure to take medication can occur before eviction will result. If attempts at reasonable accommodation were to start anew every time that residents fail to take their necessary medication, then the property manager and other residents would be subjected to the threatening conduct indefinitely.¹³⁸ The question that presents itself with this

135. See *Salute*, 136 F.3d at 300; *Hovsons v. Township of Brick*, 89 F.3d 1096, 1104 (3d Cir. 1996).

136. See *Hovsons*, 89 F.3d at 1104.

137. The comments to 24 C.F.R. § 100.204 state, "The Department wishes to stress that a housing provider is not required to provide supportive services, e.g., counseling, medical, or social services that fall outside the scope of the services that the housing provider offers to residents." Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232, 3249 (Jan. 23, 1989).

138. In *Housing Authority of Lake Charles, La. v. Pappion*, a case brought under Section 504 of the Rehabilitation Act, the housing complex sought to evict a tenant who suffered from paranoid

solution is who bears the responsibility for monitoring the resident's compliance because a property manager is not required to engage in activities that constitute "social services."¹³⁹ The logical answer would seem to be that the responsibility falls upon the resident and his social worker or physician to ensure compliance. If additional incidents of disruptive, abusive, or destructive conduct occur, then it would fall upon the resident to prove he had been taking his medication. If he could not prove this, then the property manager would have the right to evict the resident.

In other cases, giving the resident time to seek treatment was deemed a reasonable accommodation. In *City Wide Associates. v. Penfield*,¹⁴⁰ a tenant with a psychiatric disability beat on the walls of her apartment, causing minor damage. This case, brought under Section 504 of the Rehabilitation Act, involved a tenant who suffered from auditory hallucinations. The woman caused damage to the walls of her apartment by throwing objects at them to drive away the voices that she heard. As a result, the landlord sought eviction. The court required that before the tenant could be evicted, she was allowed to have time to obtain mental health services that could be effective in moderating her behavior.¹⁴¹ The court reasoned that the cost of the damage caused to the apartment was small compared to the benefit to the tenant.¹⁴² Ultimately, the solution involved a modification of the woman's behavior. The solution was creative and simple; the woman was

schizophrenia. 540 So. 2d 567 (La. Ct. App. 1989). The tenant had allegedly threatened to kill one of the other residents and engaged in other disruptive and abusive conduct. The tenant alleged that this disruptive conduct was a result of his failure to take medication and that at the time of trial he was taking the medication. The court held that the housing complex was within its rights in terminating the tenant's lease. *Id.* at 570. The court stated:

[T]here is no guarantee that defendant will take his medication regularly in the future. . . . [D]efendant at any time could decide he doesn't need treatment or medication and again exhibit bizarre behavior. If that were to occur, the parties would be in the same position as they are in this case and making the same arguments.

Id.

In another case, *Frank v. Park Summit Realty Corp.*, brought as a nuisance action, the plaintiff's nephew, who suffered from schizophrenia, periodically resided in the plaintiff's apartment. 175 A.D.2d 33 (N.Y. App. Div.), *rev'd*, 587 N.E.2d 287 (N.Y. 1991). The nephew's condition was controlled by the appropriate medication, but when he failed to take the medication his behavior would become "bizarre and disturbing." *Id.* Repeated incidents of nudity in public, verbal abuse, profanity and vulgarity, and threats of assault were reported. The appellate court recognized that allowing the cycle to continue, where the nephew's use of his medication was on again, off again, was unfair to the property manager and other residents. In finding for Park Summit, the court stated, "[Park Summit] and its guests and staff had already been forced to endure an intolerable and continuing nuisance." *Id.* at 34-35.

139. 54 Fed. Reg. 3232, 3249.

140. 564 N.E.2d 1003 (Mass. 1991).

141. *Id.* at 1005.

142. *Id.*

given a “nerf” bat to use when striking the walls to lessen the damage.¹⁴³ This case demonstrates that creativity can provide a solution. While this accommodation may not address the woman’s overall mental health, it does provide a solution that will allow her to remain in her home.

Other cases demonstrate that more drastic accommodations may not be workable. In *Marthon v. Maple Grove Condominium Association*, the condominium complex consulted with acoustical consultants “to determine a solution for the noise transmission between units.”¹⁴⁴ Although the consultants made recommendations to reduce the noise, the report concluded that the suggested measures “will not adequately attenuate or mask the offending noise.”¹⁴⁵ The use of a white noise machine or ear plugs by the disturbed neighbor were also offered as suggestions, but, for reasons that are unclear, proved to be ineffective and inappropriate.

As these cases demonstrate, there are a variety of simple accommodations that may alleviate conduct that constitutes a direct threat. However, some accommodations may prove to be unworkable. Additionally, all accommodations must be viewed in light of the cost/benefit balancing test, which most courts deciding cases involving disruptive, abusive, or destructive residents seemingly have failed to consider. The cost of eviction to a disabled person and the cost of not evicting to the property manager and other residents can both be severe. However, the benefit that can be achieved through a workable accommodation is great so it is important that this cost/benefit analysis be performed carefully. The ADA factors for determining whether an accommodation poses an undue burden are helpful and should be considered when performing this analysis.

CONCLUSION

These cases present difficult problems because of the conflicting interests of the parties involved. It is important that the interests of disabled people and the aims of Congress to integrate disabled individuals into society are met, and everything possible should be done to make reasonable accommodations that will allow this goal to be achieved. However, it is possible that not all people are meant to live in mainstream society. Individuals who have exhibited conduct that is harmful to other people should not live in a manner that endangers other peoples’ health and safety. Congress specifically included the direct threat exception in the FHAA to avoid this situation.

The law says that a property manager must attempt to reasonably accommodate a disruptive, abusive, or destructive tenant, if an accommodation

143. BAZELON CENTER FOR MENTAL HEALTH LAW, FAIR HOUSING INFORMATION SHEET #4, USING REASONABLE ACCOMMODATIONS TO PREVENT EVICTION, available at <http://bazelon.org/fhinfosheet4.html>.

144. 101 F. Supp. 2d 1041, 1046 (N.D. Ill. 2000) (resident suffering from Tourette’s Syndrome engaged in involuntary throat clearing, hooting, barking, foot stomping, and other vocal and motor tics on a nightly basis resulting in a neighbor being unable to sleep).

145. *Id.* at 1047.

will alleviate the nature of the direct threat posed by that tenant. However, there is little additional guidance regarding how this goal is to be achieved. Standards developed by case law and contained in statutes under the Rehabilitation Act of 1973 and the ADA offer some helpful guidance on the appropriate course of action for property managers. The burden should not be placed entirely on the property manager to propose and implement an accommodation that will alleviate the nature of a direct threat. The disabled resident should bear the primary responsibility for proposing an accommodation that is reasonable, and the property manager would then bear the responsibility to make sure the accommodation is properly implemented. Although not required by the language of the FHA, a process where the property manager engages in an interactive process with a resident seems the likeliest way to arrive at an accommodation that will meet the needs of all the parties involved. Before overlooking the use of an interactive process, the parties need to consider the benefits that will be achieved if a workable accommodation is developed. An accommodation that will alleviate a direct threat will allow disabled residents to remain in their homes, consistent with the policy aims of Congress, and will eliminate the prospect of expensive litigation for all of the parties involved.

PREScriptions FOR CHANGE: THE HATCH-WAXMAN ACT AND NEW LEGISLATION TO INCREASE THE AVAILABILITY OF GENERIC DRUGS TO CONSUMERS*

JANET A. GONGOLA**

INTRODUCTION

In 1984, Congress attempted to delicately balance the interests of innovator pharmaceutical companies (“innovators”) and generic drug manufacturers (“generics”) by enacting the Drug Price Competition and Patent Term Restoration Act of 1984, better known as the Hatch-Waxman Act.¹ Congress guaranteed innovators seventeen-year patent terms to encourage the research and development of valuable new drugs.² This aspect of the law may appear to delay generic competition on its face. Congress, however, eased the regulatory burden on generics by eliminating the need to repeat costly clinical trials to prove the effectiveness of generic drugs.³ Instead, the law enabled generics to establish the bioequivalence of generic drugs with brand drugs.⁴ As a result, generics are able to make lower-costing generic copies of brand drugs more widely available to consumers faster than if they were required to conduct clinical trials.

On the surface, the Hatch-Waxman Act appears to have accomplished this balance. Innovators increased their research and development (“R&D”) spending from \$3.6 billion in 1984 to over \$30 billion in 2001.⁵ They also developed more than 370 life saving medicines in the last ten years as compared to 239 in the

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** J.D. Candidate, 2003, Indiana University School of Law—Indianapolis; B.S., 1994, Muskingum College, New Concord, Ohio. I thank Dr. Fred Hunter for his valuable comments on prior drafts of this note. I am also grateful to Professor George Wright for his support and helpful conversations.

The author is a registered patent agent at Eli Lilly and Company, Indianapolis, Indiana. The views and opinions of the author are her own and do not necessarily reflect those of Eli Lilly and Company.

1. Pub. L. No. 98-417, 98 Stat. 1585 (codified as amended in scattered sections of 15, 21, 28, and 35 U.S.C.).

2. *See id.*

3. *See id.*

4. *See id.* Bioequivalence refers to the rate and extent that the body absorbs the active ingredients in a drug. GOODMAN AND GILMAN’S THE PHARMACOLOGICAL BASIS OF THERAPEUTICS 10 (Alfred Goodman Gilman et al. eds., 8th ed. 1990).

5. *Recent Developments Which May Impact Consumer Access to, and Demand for, Pharmaceuticals: Hearing Before the Subcomm. on Health of the House Comm. on Energy and Commerce*, 107th Cong. (June 13, 2001) [hereinafter *House Energy and Commerce Hearing*] (statement of Rep. Barbara Cubin, Member, House Comm. on Energy and Commerce). *See also* Press Release, Pharmaceutical Research and Manufacturers of America, Pharmaceutical Companies Made 32 New Treatments Available to Patients in 2001 and Invested an Estimated \$30.3 Billion in R&D (January 25, 2002) [hereinafter PhRMA Press Release] at <http://www.phrma.org/mediaroom/press/releases/25.01.2002.329.cfm>.

previous decade.⁶ The Act has likewise played a pivotal role in spawning the birth of the generic industry. The Congressional Budget Office estimated that thirteen percent of total prescriptions filled in 1980 were for generic drugs.⁷ In contrast, by 1998, generics comprised fifty-eight percent of total prescriptions dispensed.⁸ Moreover, in ranking the top five drug distributors on the basis of prescriptions dispensed, three of the top five were generic companies, namely Watson, Mylan, and Teva.⁹

The balance may have, nonetheless, shifted in recent times because the law has enabled both innovators and generics to abuse the Hatch-Waxman Act. Generics accuse innovators of "patent evergreening" to preserve their monopolies.¹⁰ In addition, generics allege that innovators "game" the system by filing patent applications for peripheral aspects of inventions such as a drug's color, label, or indication.¹¹ Thus, they contend that innovators block lower cost medications from reaching the public. For instance, generics point to consumers like Florence Rubin to exemplify their arguments. Ms. Rubin spends \$117 per month for the brand drug Prilosec to control a chronic digestive problem.¹² Ms. Rubin says, "It's so costly. I don't have a drug plan, and I pay full price."¹³

To counter these allegations, innovators assert that many generics file frivolous Paragraph IV certifications in hopes of feasting upon the innovators'

6. *House Energy and Commerce Hearing*, *supra* note 5 (statement of Dr. Gregory J. Glover, Partner, Ropes & Gray, on behalf of Pharmaceutical Researchers and Manufacturers of America). See also PhRMA Press Release, *supra* note 5 (noting that pharmaceutical and biotechnology companies added thirty-two new treatments—twenty-four drugs and eight biologics—in 2001 alone).

7. *House Energy and Commerce Hearing*, *supra* note 5 (statement of Rep. Barbara Cubin, Member, House Comm. on Energy and Commerce).

8. *Id.*

9. *Id.* (statement of Bruce L. Downey, Chairman, Barr Laboratories, Inc., on behalf of the Generic Pharmaceutical Association).

10. *Id.* (statement of Rep. Gene Green, Member, House Comm. on Energy and Commerce). "Patent evergreening" refers to the combination practice of staggering the filings of a number of patent applications and at the same time, applying for patent term extensions. See, e.g., Terry G. Mahn, *Patenting Drug Products: Anticipating Hatch-Waxman Issues During the Claims Drafting Process*, 54 FOOD DRUG L.J. 245, 248-49 (1999).

11. *House Energy and Commerce Hearing*, *supra* note 5 (statement of Rep. Gene Green, Member, House Comm. on Energy and Commerce); see also *id.* (statement of Bruce L. Downey, Chairman, Barr Laboratories, Inc., on behalf of the Generic Pharmaceutical Association) (describing Bristol-Myers Squibb's (BMS) late-minute listing of a new Buspar metabolite patent one day prior to the entry of generic competition and patenting of methods of administration and stabilization for Taxol, a compound that BMS testified before Congress in 1991 was neither patented nor patentable).

12. Glenn Singer, *Drug Companies Battle in the War Over Generics; Patent Holders, Challengers Often Seem to Rely More on Lawyers Than on Scientists*, SUN-SENTINEL, Nov. 18, 2001, at 1H, available at LEXIS, Major Newspapers File.

13. *Id.*

profits.¹⁴ Moreover, innovators also seek to dispel the myth that generics dutifully guard consumers against the high prices set by innovators. To this end, innovators point out that generics are business entities formed to earn profit; they are not non-for-profit institutions designed to protect consumers' pocketbooks. For example, Watson enjoyed 2001 revenues of \$1,160,676,000 (net profit margin ten percent); Mylan's profits soared to \$1,070,100,000 (net profit margin twenty-two percent) that same year; and Barr earned \$959,651,000 in 2001 (net profit margin fifteen percent).¹⁵ Bruce Downey, Chairman and CEO of Barr Laboratories, even commented that "challenging patents protecting select branded products" is among Barr's three key business strategies and that such practice should yield a "steady cash flow with potential for exponential growth."¹⁶

Amidst the battle cries of innovators and generics, the Department of Justice ("DOJ") and Federal Trade Commission ("FTC") have initiated their own "drug war."¹⁷ That is, the FTC is closely scrutinizing settlement agreements made between innovators and generics during the pendency of patent litigation.¹⁸ The agencies are suspicious that such agreements are designed to prevent generic competition.¹⁹ As well, the FTC sent subpoenas to ninety pharmaceutical companies in 2001 to examine whether they improperly delayed the sale of generic drugs.²⁰

Meanwhile, in reaction to both pressure from generics to revamp the ANDA system and the recent Schering-Plough/Upsher Smith Laboratories-ESI Lederle settlement agreement, legislators are directly taking action in the "drug war."

14. In filing an abbreviated new drug application (ANDA) with the Food and Drug Administration (FDA), an applicant must certify that the drug for which approval is sought will not infringe any valid, enforceable patent that the holder of the new drug application (NDA) listed with the FDA. See 21 U.S.C. § 355(j)(2)(A)(viii)(I) to (IV) (2000); see also Terry Mahn & Jill B. Deal, *Orange Book Games*, FDLI UPDATE 2001, May-June 2001, at 8, available at http://www.fdl.org/pubs/Update/2001/Issue3/Mahn_Deal/article.html (discussing *Yamanouchi Pharmaceutical Co. v. Danbury Pharmacal, Inc.*, in which the district court found that Danbury had "no reasonable basis for challenging the validity of the patent at the time of certification"); see also *Yamanouchi Pharm. v. Danbury Pharmacal, Inc.*, 21 F. Supp. 2d 366 (S.D.N.Y. 1998) and *Eli Lilly and Co. v. Zenith Goldline Pharms, Inc.*, Cause No. IP 99-38-C H/K, 2001 U.S. Dist. LEXIS 25246 (S.D. Ind. Oct. 29, 2001) (both courts concluding that ANDA applicants have a duty of due care when to file Paragraph IV certifications only under an objective good faith belief that the patent is invalid).

15. FACTIVA.COM, at <http://global.factiva.com/en/arch/display.asp> (data current through Feb. 21, 2002).

16. Jayne O'Donnell, *Makers of Generic Drugs Take Some Legal Heat, Too*, USA TODAY, June 6, 2002, at 2, available at <http://www.usatoday.com/usatoday/20020606/4170222s.htm>.

17. Neal R. Stoll & Shepard Goldfein, *War on Drugs: The FTC v. Pharmaceutical Companies*, N.Y. L. J., May 15, 2001.

18. See Lisa Jarvis, *Collusion to Stall Generics is Subject of FTC Probe*, CHEM. MKT. REPORTER, Oct. 23, 2000, at 5, available at 2000 WL 24156402.

19. *Id.*

20. Melody Petersen, *Suits Accuse Drug Makers of Keeping Generics Off Market*, N.Y. TIMES, May 10, 2001, at C1, available at <http://www.nytimes.com>.

They introduced bills before both the 107th and 108th Congresses to reform the Hatch-Waxman system. Senators John McCain and Charles Schumer are sponsoring a version of the Greater Access to Affordable Pharmaceuticals Act²¹ ("GAAP"), which is aimed at amending the Federal Food, Drug, and Cosmetic Act to provide consumers with greater access to affordable pharmaceuticals.²² Senators McCain, Schumer, Ted Kennedy, and Judd Gregg have also introduced a second version of the GAAP with slightly different provisions.²³ In addition, Senator Patrick Leahy and Representative Henry Waxman backed the Drug Competition Act ("DCA")²⁴ to "expose" deals and subject them to immediate investigation and action by the FTC or DOJ for antitrust violations.²⁵ Given that products with collective annual sales of more than \$37 billion have lost or are due to lose patent protection between 2002 and 2005,²⁶ the proposed legislation

21. S. 54, 108th Cong. (2003). This bill was originally introduced to the 107th Congress as S. 812 where it passed in the Senate in July 2002. Vote Report; Greater Access to Affordable Pharmaceuticals Act of 2001, *available at* LEXIS, Legislative Politics File. Senators McCain and Schumer reintroduced it on January 7, 2003, to the 108th Congress. Press Release, Sen. Charles Schumer, Schumer, McCain Renew Generic Drug Efforts (Jan. 7, 2003), *at* <http://schumer.state.gov>.

22. *Id.*

23. Joanne Kenen, Key Senators Agree on Generic Drug Bill, (June 4, 2003), *available at* <http://www.forbes.com/newswire/2003/06/04/rtr991184.html>.

24. S. 754 & H.R. 1530, 107th Cong. (2001).

25. Leahy, *Waxman Introduce Bills Targeting Sweetheart Deals That Delay Low-Cost Generic Drugs*, U.S. NEWSWIRE, April 26, 2001, *available at* LEXIS, News File [hereinafter *Sweetheart Deals*].

26. *House Energy and Commerce Hearing*, *supra* note 5 (statement of Bruce L. Downey, Chairman, Barr Laboratories, Inc., on behalf of the Generic Pharmaceutical Association); *see also* Eli Lilly & Company, *A Big Picture Perspective*, FOCUS MAGAZINE, Special Issue 2002, at 6 (on file with author).

Table 1: Major United States Patent Expirations

Year	Brand Name	Marketer	2001 worldwide sales (\$ millions)
2002	Claritin	Schering-Plough	3,159
	Augmetin	GlaxoSmithKline	2,046
	Intron A	Schering-Plough	1,447
2003	Cipro	Bayer	1,758
	Singulair	Merck & Co.	1,375
	Flovent	GlaxoSmithKline	1,317
2004	Lovenox	Aventis Pharmaceuticals	1,301
	Diflucan	Pfizer	1,066
2005	Zocor	Merck & Co.	6,670
	Prevacid	Tap Pharmaceuticals	2,951
	Zoloft	Pfizer	2,366
	Pravachol	Bristol-Myers Squibb	2,173
	Zithromax	Pfizer	1,506
	Biaxin	Abbott Laboratories	1,159

is timely and will offer a forum to formally address the intense Hatch-Waxman concerns of all players in the pharmaceutical industry.

Therefore, as change lurks in world of Hatch-Waxman, Section I of this Note explains the history of the Hatch-Waxman Act with particular focus on the original intent of the law. The reader must understand how the law was formed to fully appreciate the provisions of the GAAP and the DCA. Also, from this section, the reader will gain an awareness of the compromises made by innovators and generics and why even the slightest tip of the balance in favor of one side over the other causes vehement reaction.

Section II delves into aspects of antitrust law to explain why settlement agreements between innovators and generics potentially violate antitrust laws. Section III then highlights recent innovator-generic settlement agreements to elucidate these antitrust concerns. These two sections particularly show the egregious nature of settlements and their harsh impact on consumers.

Section IV explores key provisions of the GAAP and the DCA, and Section V evaluates whether these bills will return the state of the law to meet the intent of the Hatch-Waxman Act. This Note argues that the GAAP will suffocate not only innovators, but ultimately generics who will be unable to survive when innovators are forced to downsize. With this potential effect, this Note contends that the GAAP is a poison to the pharmaceutical industry. In contrast, this Note advocates that the DCA is exactly one of the supplements that the pharmaceutical industry needs to maintain good health. The DCA assures consumers that innovators and generics will not collude to fatten their profits margins at the expense of seniors, disabled persons, and the uninsured. Finally, this Note maintains that the true solution to accomplish greater access to affordable pharmaceuticals lies in the passage of a Medicare prescription drug benefit.

I. HISTORY AND APPLICATION OF THE HATCH-WAXMAN ACT

The 1962 Amendment of the Federal Food, Drug, and Cosmetic Act²⁷ required both innovators and generics to establish the safety and effectiveness of their drug products via human clinical trials prior to Food and Drug Administration approval.²⁸ The Amendment forbid a generic from merely relying on the testing performed by an innovator because trade secret laws protected the innovator's trial results.²⁹ Consequently, a generic would be forced to repeat extensive clinical trials, and these trials could not begin until the innovator's patents covering the drug expired.³⁰ To proceed otherwise, the generic risked

27. Drug Amendments of 1962, Pub. L. No. 87-781, 76 Stat. 780 (codified as amended in scattered sections of 21 U.S.C.).

28. Alfred B. Engelberg, *Special Patent Provisions for Pharmaceuticals: Have They Outlived Their Usefulness?*, 39 IDEA 389, 396-97 (1999); see also U.S. FOOD AND DRUG ADMINISTRATION, THE EVOLUTION OF U.S. DRUG LAW, at <http://www.fda.gov/fdac/special/newdrug/benlaw.html> (last visited Jan. 27, 2003).

29. Joseph P. Reid, *A Generic Drug Price Scandal: Too Bitter a Pill for the Drug Price Competition and Patent Term Restoration Act to Swallow?*, 75 NOTRE DAME L. REV. 309, 314 (1999).

30. *Id.*

being sued by the innovator for patent infringement.³¹

A generic could, however, offer published data concerning the safety and efficacy of a previously approved drug to demonstrate that its product was safe and effective.³² Such data were not available for all drugs though.³³ Moreover, the Amendment did not prevent the FDA from requesting additional clinical studies to address adverse reactions or other data published after initial approval of the innovator's drug.³⁴ Thus, the 1962 Amendment essentially limited the number of generic drugs on the market and prolonged the time necessary to obtain approval for a new generic.

The generic industry received consolation for the 1962 Amendment with the *Roche Products, Inc. v. Bolar Pharmaceutical Co.* district court decision.³⁵ In efforts to prepare an NDA, Bolar Pharmaceutical Co. manufactured and tested a generic version of Roche Products, Inc.'s patented prescription sleeping pill Dalmare.³⁶ Roche filed a patent infringement action against Bolar, alleging that Bolar initiated clinical trials before the expiration of the Dalmare patent. In response, Bolar asserted that the manufacture and testing was permissible under the law because it was for the purposes of obtaining FDA approval. The district court agreed with Bolar and permitted the experimentation before Roche's patent expired.³⁷

In light of the tensions in the pharmaceutical industry, the stage was set for legislation to expedite generic drug approvals and to stimulate competition between innovators and generics. Both houses of the 97th Congress (1980-82) introduced bills³⁸ to provide patent-term extensions of up to seven years to compensate innovators for lost marketing time caused by governmental delays in assessing the safety and efficacy of drugs.³⁹ This legislation, however, lacked any provision to counter the *Roche v. Bolar* decision and thus allowed generics to engage in drug development prior to expiration of an innovator's patent without the risk of an infringement action.⁴⁰ Nevertheless, it failed to streamline the drug approval process for generics.⁴¹ Despite 250 votes in favor of passage, this legislation did not earn the required two-thirds majority.⁴²

During the 98th Congress (1983-1985), Representative Henry Waxman and members of the innovator and generic drug industries, namely the Pharmaceutical Manufacturers Association ("PMA") now known as the Pharmaceutical Research and Manufacturers Association ("PhRMA") and the Generic Pharmaceutical

31. *Id.*

32. Engelberg, *supra* note 28, at 397.

33. *Id.*

34. *Id.*

35. 572 F. Supp. 255 (E.D.N.Y. 1983).

36. *Id.* at 256.

37. *Id.* at 258.

38. Patent Term Restoration Act, S. 255 and H.R. 1937, 97th Cong. (1980-82).

39. Engelberg, *supra* note 28, at 397.

40. *Id.* at 398.

41. *Id.*

42. *Id.* (noting that Reps. Henry Waxman and Albert Gore, Jr. cast the critical "no" votes).

Industry Association ("GPIA"), began negotiations to reach a compromise.⁴³ Senator Orrin Hatch later joined Representative Waxman in these negotiations and championed the proposed legislation in the Senate.⁴⁴ Hatch-Waxman legislation "was predicated on the desire to enhance the growth of the generic drug industry, while simultaneously extending patent protection for brand-name drugs developed by the research-based industry."⁴⁵ Accordingly, representatives from PMA and GPIA thrashed out provisions to benefit their respective interests. The initial draft provided for an expedited generic drug approval process, codified the *Roche v. Bolar* decision, and amended patent law to provide for patent term extensions.⁴⁶ PMA was especially concerned with a streamlined drug approval process because most generics were quite small and could not afford to pay damages if they were found guilty of infringement.⁴⁷ Nevertheless, the catalyst that triggered the ultimate rift occurred when the Court of Appeals for the Federal Circuit ("Federal Circuit") reversed the district court's decision in *Roche v. Bolar* in mid-1984.⁴⁸ The Federal Circuit held that Bolar's actions were not limited to scientific inquiry, but instead extended the experimentation for business reasons and thereby infringed Roche's patent.⁴⁹ In response to this ruling, several large pharmaceutical members, including Merck, Johnson & Johnson, Hoffman LaRoche, and American Home Products, balked at the initial draft because it contained an experimental use exception.⁵⁰

Senator Hatch returned to the bargaining table and resumed arbitration between PMA and GPIA in the summer of 1984.⁵¹ Ultimately, the compromise left the Bolar exemption intact, but several new provisions were added to compensate innovators. The Senate and House approved S. 2748 and H.R. 3605, respectively, in September 1984.⁵² President Ronald Reagan signed the Hatch-Waxman Act into law on September 24, 1984.⁵³

Title I of the Act, codified as Title 21 of the United States Code,⁵⁴ favored the interests of generics by authorizing a novel mechanism for rapid generic FDA approval, namely the ANDA.⁵⁵ It also limited the scope of data that the FDA required in ANDAs to only bioavailability results.⁵⁶ ANDA applicants were no longer required to repeat the expensive and lengthy clinical trials previously

43. *Id.* at 398-99.

44. *Id.* at 401.

45. *Bill To Ease Way for Generics Is Introduced in the House*, CHAIN DRUG REV., June 4, 2001, at RX11, available at LEXIS, News File.

46. Engelberg, *supra* note 28, at 401.

47. *Id.* at 399.

48. *Roche Prod. v. Bolar Pharm.*, 733 F.2d 858, 867 (Fed. Cir. 1984).

49. *Id.* at 863.

50. Engelberg, *supra* note 28, at 404.

51. *Id.* at 405.

52. *Id.* at 407.

53. *Id.*

54. See H.R. REP. NO. 857 (Part I), 98th Cong., 2nd Sess. at 14 (1984).

55. See 21 U.S.C. § 355(j)(4)(f) (2000).

56. See *id.* § 355(j)(4)(f).

mandated by federal law.⁵⁷ In addition, the law required an ANDA applicant to show that its product had the same active ingredient, route of administration, dosage form, strength, and labeling requirements as the brand drug approved in a New Drug Application (NDA).⁵⁸

In turn, the holder of an approved NDA must inform the FDA, under 21 U.S.C. § 355, of any patent that could reasonably be asserted to cover the drug in question.⁵⁹ Specifically, the holder must “list” the patent number and expiration date of any patent claiming the drug or a method of using the drug and upon which the NDA holder could file a claim of patent infringement if a person not licensed by the owner engaged in the manufacture, use, or sale of the drug.⁶⁰ Process patents were not covered under 21 U.S.C. § 355, and therefore, information about them does not have to be submitted. The FDA is required to then publish the submitted patent information in a document called “Approved Drug Products with Therapeutic Equivalence Evaluations,” more commonly known as the Orange Book.⁶¹ The FDA will not review the patents submitted by the NDA holder or assess whether the claims in these patents cover the approved drug.⁶² In addition, the FDA will not determine if a claim for patent infringement could reasonably be asserted against the unauthorized use of the patented drug.⁶³ “The FDA has determined that Congress intended the filing requirement to provide notice to potential NDA or ANDA applicants of patents that may protect the pioneer drug product.”⁶⁴

In order to secure FDA approval in light of these listings, the ANDA applicant must then certify to the FDA, pursuant to 21 U.S.C. § 355, that their generic version of the approved drug will not interfere with any patents that the NDA holder was required to “list.”⁶⁵ That is, the ANDA applicant must certify one of the following: (i) that such patent information has not been filed; (ii) that such patent has expired; (iii) the date such patent will expire; or (iv) that such patent is invalid or will not be infringed by the generic product.⁶⁶ These options are designated as Paragraph I, II, III, or IV certifications, respectively, in the

57. See *id.* § 355(j); see also 21 C.F.R. § 314.94(a)(3) (2000).

58. See 21 U.S.C. §§ 355(j)(2)(A)(iii), (j)(4)(D)(i)-(ii); see also 21 C.F.R. § 314.92(a)(1) (indicating the categories of drug products for which an ANDA may be filed).

59. See 21 U.S.C. § 355.

60. See *id.*; see also 21 C.F.R. § 314.53.

61. See 21 U.S.C. § 355(b)(2) & (j)(7)(A).

62. *Competition in the Pharmaceutical Marketplace: Antitrust Implications of Patent Settlements: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. (May 24, 2001) [hereinafter *Senate Judiciary Hearing*] (statement of Gary Buehler, Acting Director, Office of Generic Drugs, Center for Drug Evaluation and Research, Food and Drug Administration).

63. *Id.*

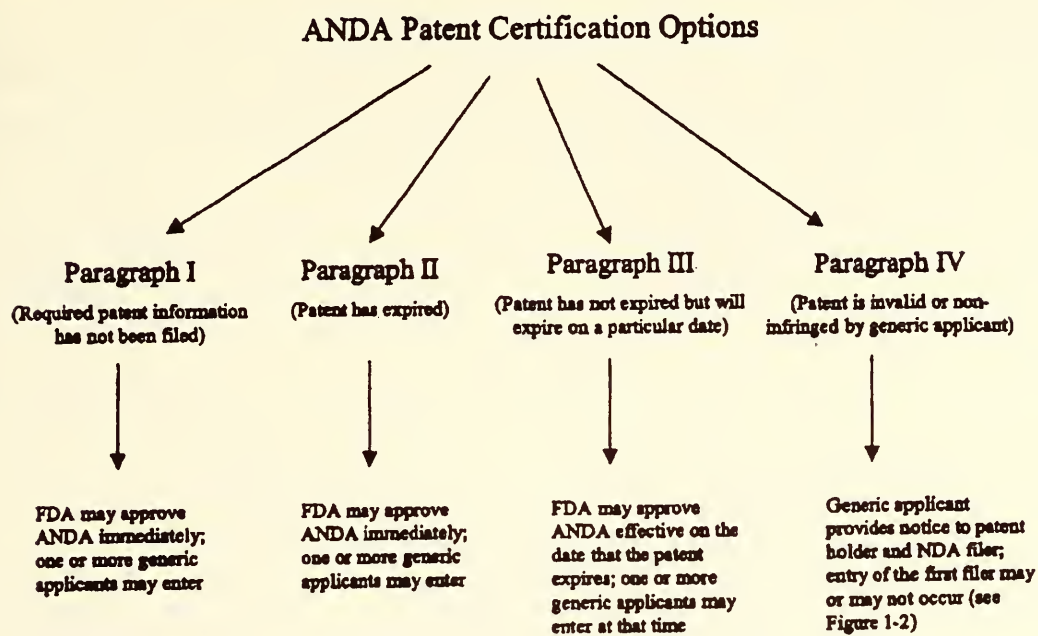
64. Brian D. Coggio & Francis D. Cerrito, *The Application of the Patent Laws to the Drug Approval Process*, ANDREWS PHARMACEUTICAL LITIGATION REPORTER, Aug. 1997, available at WESTLAW, News File.

65. See 21 U.S.C. § 355(j)(2)(vii); see also 21 C.F.R. § 314.94(a)(12).

66. See 21 U.S.C. 355(j)(2)(A)(vii)(I) to (IV).

Hatch-Waxman system. They are depicted graphically in Figure 1-1 below.⁶⁷

Figure 1-1 ANDA Patent Certifications



With a Paragraph I or II certification, the FDA may grant approval as soon as it is satisfied that the product is safe and effective.⁶⁸ Under a Paragraph III certification, the FDA may grant approval as soon as the patent on the innovator’s drug expires.⁶⁹ Paragraph IV certifications present a more unique situation. The timing for FDA approval depends on the actions taken by both the NDA holder and patent holder in response to a Paragraph IV certification notice.

Filing an ANDA with a Paragraph IV certification is a “technical” or “artificial” act of infringement under 35 U.S.C. § 271 and gives rise to a case or controversy under patent laws.⁷⁰ Consequently, the ANDA applicant must explain why a generic version of the approved drug would not infringe the patent covering the approved drug or why such patent is invalid.⁷¹ In response, the patent holder has the option of filing a patent infringement action within forty-five days after receiving such notice.⁷² If the patent holder fails to bring suit, then the FDA may approve the ANDA. On the other hand, if the patent holder elects to bring suit, then the effective date of any FDA approval is delayed for either thirty months or until a court rules that the patent is invalid or not

67. Federal Trade Commission, *GENERIC DRUG ENTRY PRIOR TO PATENT EXPIRATION: AN FTC STUDY 6* (July 2002), available at <http://www.ftc.gov/os/2002/07/genericdrugstudy.pdf> [hereinafter *FTC STUDY*].

68. See 35 U.S.C. § 271(j)(5)(B)(i) (2000).

69. See *id.* § 271(j)(5)(B)(ii).

70. See *id.* § 271(e)(2).

71. See *id.* § 271(j)(2)(B)(i); see also 21 C.F.R. § 314.95 (2000).

72. See 21 U.S.C. § 355(j)(5)(B)(iii) (2000).

infringed, whichever occurs first.⁷³ The drafters allotted thirty months for the stay period in order to allow ample time for the ANDA approval process and any litigation.⁷⁴ Thus, the purpose of a Paragraph IV certification was to ensure adjudication of the rights of a patent holder before any economically damaging competition.⁷⁵

Incentive to file an ANDA or engage in a patent infringement suit exists because the first filer is awarded a 180-day period of market exclusivity beginning either from the date the generic begins commercial marketing of the generic drug product or from the date of a court decision.⁷⁶ "The purpose of the 180-day exclusivity provision was to insure that one generic competitor would not get a free ride on the litigation effort of another generic competitor until the party who . . . [financed] the cost and risk of litigation had a fair opportunity to recover its litigation costs."⁷⁷ Interestingly, the courts and FDA differ on what qualifies as a "court decision" capable of triggering the 180-day exclusivity period. The courts have held that a "court decision" is any district court ruling that a patent is invalid, unenforceable, or will not be infringed by the generic drug product.⁷⁸ In contrast, the FDA originally interpreted this phrase to mean a ruling from which no appeal was possible to avoid subjecting generics to treble damages in the event that an appellate court ruled in favor of the patent holder.⁷⁹ Today, however, the FDA has adopted the court's position and acknowledges that the "court decision" trigger is satisfied by a district court decision.⁸⁰ During the 180-day exclusivity period, the FDA cannot approve any subsequently submitted ANDA for the same drug.⁸¹ Therefore, the ANDA applicant who receives the exclusivity will block all generic competition for the innovator.⁸² Figure 1-2 below graphically shows how the thirty-month stay and 180-day exclusivity provisions affect FDA approval of an ANDA.⁸³

73. *See id.*

74. *See Engelberg, supra* note 28, at 422.

75. *See id.* at 414-15.

76. *See* 21 U.S.C. § 355(j)(5)(B)(iv)(I), (II).

77. Engelberg, *supra* note 28, at 423.

78. *Senate Judiciary Hearing, supra* note 62 (statement of Gary Buehler, Acting Director, Office of Generic Drugs, Center for Drug Evaluation and Research, Food and Drug Administration).

79. *Id.*

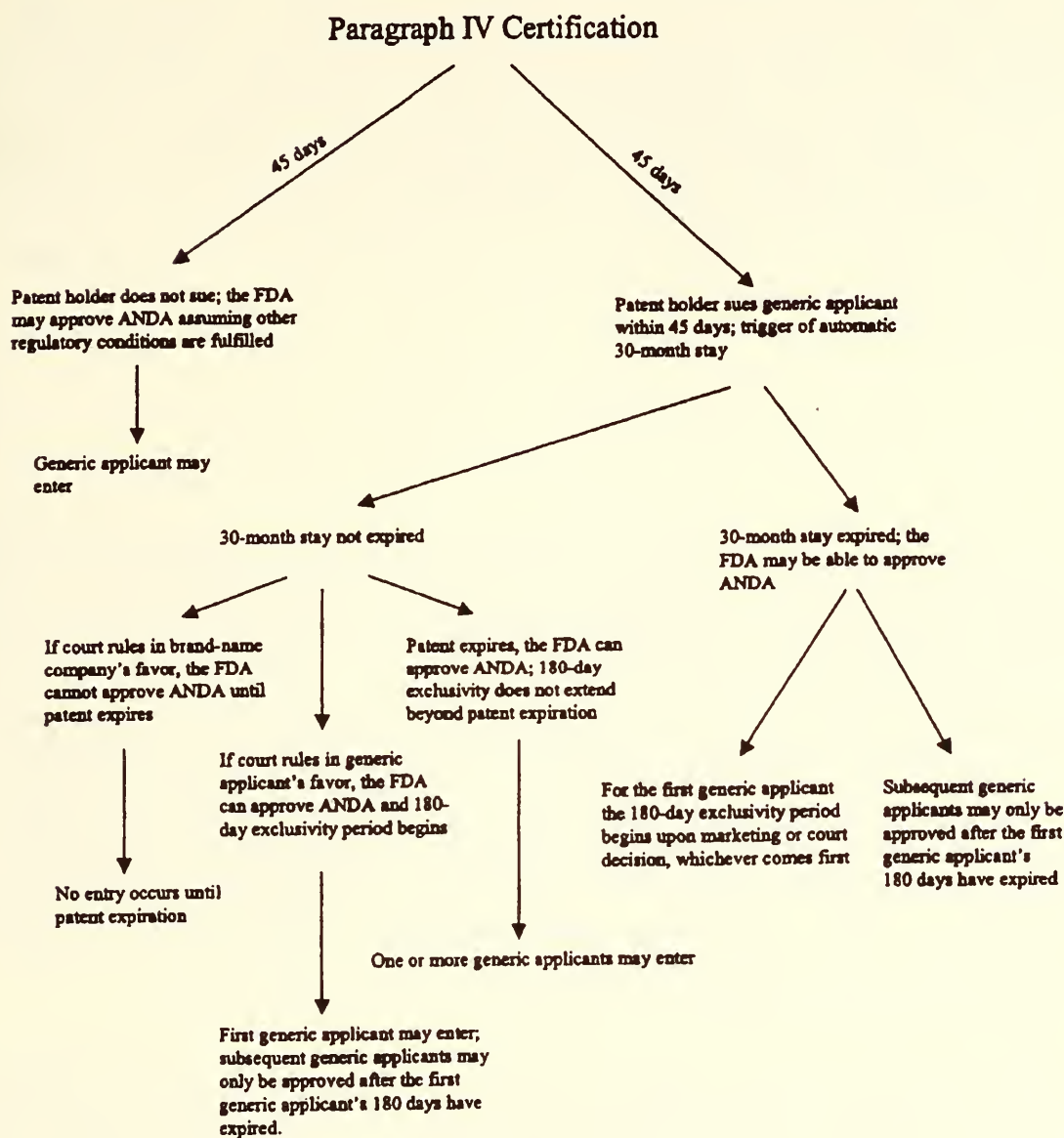
80. *See Mylan Pharm., v. Shalala*, 81 F. Supp. 2d 30, 34 (D.D.C. 2000) (noting that the FDA's original interpretation of "court decision" was challenged).

81. *See Senate Judiciary Hearing, supra* note 62 (statement of Gary Buehler, Acting Director, Office of Generic Drugs, Center for Drug Evaluation and Research, Food and Drug Administration).

82. *See id.*

83. FTC STUDY, *supra* note 67, at 8.

Figure 1-2 Paragraph IV Certifications



Title II of the Act, codified as Title 35 of United States Code,⁸⁴ favored the interests of innovators by granting patent term extensions and guaranteeing five-years of data package exclusivity for new chemical entities (NCEs). Particularly, the innovator receives a term extension equal to one-half of the time period from the start of human clinical trials to NDA approval.⁸⁵ The maximum extension period equals five years, and the total marketing exclusivity time cannot exceed fourteen years.⁸⁶

The innovator also receives a data package exclusivity period commencing on the day of NDA approval and continuing for five years thereafter.⁸⁷ A generic may not file an ANDA during this period unless it contains a Paragraph IV

84. See H.R. Rep. No. 857 (Part I), 98th Cong., 2nd Sess. at 15 (1984).
85. See 35 U.S.C. § 156 (2002).
86. See *id.*
87. See *id.*

certification.⁸⁸ With such certification, the ANDA may be filed after four years from the date of NDA approval.⁸⁹

Beyond question, the five-year non-patent exclusivity . . . was key to the compromise. This provision assured innovators of a reasonable opportunity to recoup development costs and to make profit irrespective of the existence of patents. It did not deprive generic manufacturers of any important economic right since there is no real incentive to develop a generic drug until a market has been established and any post-approval issues of safety and efficacy have been resolved by broad use in the general population.⁹⁰

II. ANTITRUST CONCERNS

A. General Principles

Similar to the balance struck in Hatch-Waxman system, antitrust law seeks to balance the exclusionary rights needed to fuel innovation with those that strive to maintain competition.⁹¹ Hence, both antitrust law and intellectual property law are predicated on advancing innovation.

[Intellectual property] law, properly understood preserves incentives for . . . innovation. Innovation benefits consumers through the development of new and improved goods and services, and spurs economic growth. Similarly, antitrust law, properly understood, promotes innovation and economic growth by combating restraints on vigorous competitive activity. By deterring anti-competitive arrangements and monopolization, antitrust law also ensures that consumers have access to a wide variety of goods and services at competitive prices.⁹²

Thus, the DOJ and FTC issued "Antitrust Guidelines for the Licensing of Intellectual Property" ("Guidelines") in 1995 to provide standards for assessing whether a business practice is anti-competitive.⁹³ These Guidelines focus on whether there would have been competition in the marketplace absent an agreement between the competitors not to compete with each other. They fail,

88. *See id.*

89. *See id.*

90. Engelberg, *supra* note 28, at 406.

91. Sheila F. Anthony, Riddles and Lessons for the Prescription Drug Wars: Antitrust Implications of Certain Types of Agreements Involving Intellectual Property, Address at the ABA "Antitrust and Intellectual Property: The Crossroads" Program (June 1, 2000), at <http://www.ftc.gov/speeches/anthony/sfip000601.htm>.

92. Press Release, Federal Trade Commission, Muris Announces Plans for Intellectual Property Hearings (Nov. 15, 2001), at <http://www.ftc.gov/opa/2001/11/iprelease.htm>.

93. *See* U.S. Department of Justice & Federal Trade Commission, Antitrust Guidelines for the Licensing of Intellectual Property, at <http://www.usdoj.gov/atr/public/guidelines/guidelin.htm> (last visited Jan. 27, 2003) [hereinafter Antitrust Guidelines].

however, to address the particular anti-competitive nature of patent settlements in the context of Paragraph IV Hatch-Waxman litigation.

The Guidelines embody three central tenets. First, the DOJ and FTC apply the same general antitrust principles to intellectual property as they apply to conduct involving any form of tangible or intangible property.⁹⁴ Intellectual property is not accorded a status either completely free from scrutiny or completely susceptible to it.⁹⁵ The Agencies thus scrutinize conduct involving intellectual property to the same degree as conduct involving any form of private property.⁹⁶

Second, the Agencies do not presume that intellectual property creates market power, despite the fact that a patent confers the right to exclude others with respect to a specific patentable invention.⁹⁷ Rather, they recognize that market power resulting solely from a superior product, business acumen, or historic accident does not violate antitrust laws.⁹⁸ Nonetheless, the Agencies do acknowledge that if market power was acquired or maintained illegally, then a property owner could adversely harm competition.⁹⁹

Third, the FTC and DOJ generally consider intellectual property to be procompetitive.¹⁰⁰ They are aware that licensing, cross licensing, or otherwise transferring intellectual property may benefit consumers and introduce new products.¹⁰¹ Nevertheless, when a licensing arrangement creates a horizontal relationship¹⁰² in a relevant market to restrain trade, the Agencies grow concerned about the anti-competitive potential of such agreements.¹⁰³ They recognize that the existence of a horizontal relationship does not, in itself, indicate that the relationship is anti-competitive, but they use this relationship type merely to aid in determining whether the agreement has anti-competitive effects.¹⁰⁴

94. *Id.* § 2.1.

95. *Id.*

96. *Id.*

97. *Id.* § 2.2.

98. *Id.*

99. *Id.*

100. *Id.* § 2.3.

101. *Id.* The text provides an example of a synergistic license: the patent owner of a machine and the patent owner of the process for using the machine, each blocking the other's use of the invention, may form a cross-license to develop new technology which would not have occurred but for the cross-license.

102. *Id.* § 3.3. The FTC and DOJ treat the relationship between two parties, such as between a licensor and licensee or between two licensees, as "horizontal" when the parties would have been actual or likely competitors in a relevant market in the absence of an agreement.

103. *Id.* § 3.1.

104. Federal Trade Commission, *An Antitrust Primer*, at <http://www.ftc.gov/bc/compguide/antitrust.htm>. (last visited Jan. 27, 2003).

B. Rule of Reason

Using these tenets as a source of direction, the DOJ and FTC typically use either a "rule of reason" or an unlawful "per se" analysis scheme.¹⁰⁵ To determine which scheme is appropriate, the DOJ and FTC ask whether the restrictive provision found in the agreement aids an efficiency-enhancing integration of economic activity.¹⁰⁶ If there is no efficiency-enhancing integration and if the agreement is one that has been accorded per se treatment by the Agencies previously, then the Agencies will challenge the agreement as unlawful per se.¹⁰⁷ Under per se treatment, they do not inquire into the likely competitive effect of the agreements.¹⁰⁸

Otherwise, the Agencies utilize the rule of reason analysis scheme, which is a multi-step evaluation.¹⁰⁹ Initially, the DOJ and FTC ask whether the agreement is likely to adversely affect competition in the relevant market and investigate market conditions.¹¹⁰ If they determine that the agreement has no anti-competitive effects in the market, then they will treat it as reasonable and end their analysis.¹¹¹ Alternatively, finding a possible anti-competitive effect, the Agencies inquire whether such anti-competitive effect is reasonably necessary to achieve pro-competitive benefits or efficiencies. Essentially, the answer to this inquiry depends on whether the balance tips in favor of the pro-competitive benefits or efficiencies.¹¹² The DOJ and FTC further examine whether the agreement appears to always, or almost always, reduce output or increase prices, and at the same time whether the reduction or increase, respectively, is unrelated to the pro-competitive benefits/efficiencies.¹¹³ If this is the situation, then the Agencies will bring a challenge and not consider industry circumstances surrounding the formation of the agreement.¹¹⁴

C. Section 5 of the Federal Trade Commission Act

Once agreements are found to be of an anti-competitive nature, the Commission may bring specific charges based on the Federal Trade Commission Act ("FTC Act"). Section 5 of this Act provides that "unfair methods of competition . . . and unfair or deceptive acts or practices . . . are hereby declared unlawful."¹¹⁵ A violation of the Act is enforced through administrative

105. Antitrust Guidelines, *supra* note 93, at § 3.4.

106. *Id.*

107. *Id.*

108. *Id.* Among those restraints held "per se" unlawful are: 1) naked price fixing; 2) agreements to restrict output or maintain minimum resale price; and 3) market divisions among horizontal competitors.

109. *Id.*

110. *Id.* §§ 4.1-4.3.

111. *Id.* § 3.4.

112. *Id.*

113. *Id.*

114. *Id.*

115. 15 U.S.C. § 45(a) (2002).

proceedings before the FTC.¹¹⁶ If the Agency determines that the Act has been violated, it issues a “cease and desist” order.¹¹⁷ These orders are subject to federal judicial review.¹¹⁸

Traditionally, the Sherman and Clayton Antitrust Acts are thought to embody antitrust law. Both are felony statutes that bring criminal penalties of up to three years imprisonment and several million dollars in corporate fines.¹¹⁹ In contrast, the FTC Act is a civil statute. As well, unlike the Sherman and Clayton Acts, the FTC Act does not give rise to private actions or to treble damages.¹²⁰ Because of key differences between these statutes, the FTC Act is more workable in testing new extensions of established antitrust law such as innovator-generic settlement agreements.

The concept of unfair methods of competition encompasses four broad categories of anti-competitive behavior, and categories that violate the Sherman or Clayton Antitrust Acts also violate the FTC Act.¹²¹ Prohibited practices include: 1) horizontal price fixing; 2) vertical price fixing; 3) horizontal market allocations; 4) commercially-motivated boycotts; 5) exclusive dealing; 6) monopolization; 7) attempted monopolization; and 8) conspiracies to monopolize.¹²² Section 5 also covers actions that are not literal “letter” violations of either the Sherman Act or Clayton Act, but instead are considered “incipient” antitrust violations.¹²³

Furthermore, Section 5 includes practices that violate the policies behind the Sherman and Clayton Acts. Although Section 5 “was intended by Congress to ‘fill in the gaps in the other antitrust laws, to round them out and make their coverage complete,’”¹²⁴ this policy rationale is typically applied as an alternative or supplement to outright antitrust violations.¹²⁵ Finally, Section 5 reaches actions deemed inherently unfair.¹²⁶ This category offers the FTC broad discretion in determining what practices constitute unfair methods of competition. Therefore, Congress explicitly stated that the FTC has no authority

116. WILLIAM C. HOLMES, INTELLECTUAL PROPERTY AND ANTITRUST LAW § 10.01 (2001).

117. *Id.*

118. *Id.*

119. 15 U.S.C. §§ 1-2 (2002).

120. HOLMES, *supra* note 116, § 10.01.

121. *Id.*

122. *Id.* § 10.02.

123. *Id.* § 10.03. *See* FTC v. Brown Shoe Co., Inc., 384 U.S. 316 (1966) (noting that this Supreme Court decision gave birth to the incipency doctrine); *see also* Boise Cascade Corp v. FTC, 637 F.2d 573 (9th Cir. 1980) (noting that both the court and FTC impose a restriction application on the use of the incipency doctrine).

124. HOLMES, *supra* note 116, § 10.04 (quoting Neil W. Averitt, *The Meaning of “Unfair Methods of Competition” in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 251 (1980)).

125. *Id.* (noting that Section 5 historically was used to strike down practices proscribed by the Clayton Act, but outside of its literal reach); *see generally* Grand Union Company v. FTC, 300 F.2d 92 (2nd Cir. 1962).

126. HOLMES, *supra* note 116, § 10.05.

to declare an action unlawful on unfairness grounds unless the act “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or competition.”¹²⁷

III. FIRST GENERATION FTC LITIGATION:¹²⁸ SETTLEMENTS BETWEEN INNOVATORS AND GENERICS AND THEIR ANTITRUST IMPACTS

Innovators may settle patent infringement lawsuits resulting from Paragraph IV certifications with generics in lieu of engaging in extensive patent litigation. Notably, the “Hatch-Waxman [Act] is silent on the question of what happens in a patent infringement action if it’s resolved by settlement as opposed to going to the judge. Some have called this a loophole in the law.”¹²⁹ Consequently, these settlements have drawn the attention of the DOJ and FTC as potential antitrust risks. The Agencies are concerned such settlements fundamentally may be agreements not to compete.¹³⁰ “[I]t’s not the fact that settlements have taken place that is our concern; rather, the commission has become concerned that there are incentives created quite inadvertently under Hatch-Waxman that have led to settlements on anti-competitive terms.”¹³¹ The FTC specifically appears to object to three particular kinds of settlement provisions. These include provisions that provide for: (1) “reverse” payments; (2) restrictions on a generic’s ability to enter the market with non-infringing products; and (3) restrictions on a generic’s ability to assign or waive its 180-day marketing exclusivity period.¹³² Moreover, legislators worry that the agreements may delay market entry of new products that offer benefits, such as lower prices, to consumers and thereby frustrate the Act’s intent.¹³³ Three recent examples of objectionable settlements will be dissected as case studies in the sections to follow.

127. *Id.* (quoting 15 U.S.C. § 45(n) (1994)).

128. The FTC refers to patent settlements between innovators and generics for the purpose of delaying the entry of a generic drug into the market as “first generation litigation.” See Pharmaceutical Industry Testimony: Before the Committee On Commerce, Science, and Transportation, 107th Cong. (Apr. 23, 2002) (statement of Timothy J. Muris, Chairman, Federal Trade Commission). “Second generation litigation” focuses, in turn, on improper Orange Book listings. *Id.* As such, the FTC considers the unilateral actions of an innovator, not the collusion of an innovator and a generic, as first generation litigation. *Id.*

129. *Senate Judiciary Hearing, supra* note 62 (statement of Mark Shurtleff, Attorney General, State of Utah).

130. See *Sweetheart Deals, supra* note 25.

131. *Senate Judiciary Hearing, supra* note 62 (statement of Molly Boast, Director, Bureau of Competition, Federal Trade Commission).

132. Prepared Statement of The Federal Trade Commission Before the Committee on Commerce, Science, and Transportation, 107th Cong. (Apr. 23, 2002) (statement of Timothy J. Muris, Chairman of the Federal Trade Commission) at <http://www.ftc.gov/os/2002/04/pharmtestimony.htm>.

133. See *Sweetheart Deals, supra* note 25.

A. Abbott/Geneva

The FTC first alleged antitrust violations in the Hatch-Waxman context in a settlement between Abbott Laboratories and Geneva Pharmaceuticals involving Abbott's drug Hytrin. Abbott's Hytrin was approved to treat hypertension and benign prostatic hyperplasia (BHP).¹³⁴ Hytrin amounted to \$542 million (over eight million prescriptions) of U.S. sales in 1998.¹³⁵ BHP afflicts fifty percent of men over age sixty and results in 1.7 million office visits to a physician each year.¹³⁶

Geneva was the first generic to file ANDAs for generic versions of Hytrin in tablet and capsule forms.¹³⁷ In conjunction with its applications, Geneva filed Paragraph IV certifications, stating that these products did not infringe any Abbott patent because the patent was invalid.¹³⁸ Within forty-five days of Geneva's certification, Abbott sued on the tablet form, but failed to sue on the capsule form.¹³⁹ As a result, the thirty-month stay applied only to the tablet form, not the capsule form.¹⁴⁰ The FDA granted approval to market the capsules in March of 1998.¹⁴¹

According to the complaint, Geneva contacted Abbott on the day it received FDA approval for the capsules and announced that it would launch generic capsules unless Abbott paid to preclude market entry.¹⁴² On April 1, 1998, Abbott and Geneva entered into an interim agreement pending resolution of the patent litigation.¹⁴³ Geneva agreed not to enter the market with any version of Hytrin, even a non-infringing form, until the earlier of: 1) final resolution of the patent litigation involving the tablet formulation, including appeal to the United States Supreme Court; or 2) entry of another generic product.¹⁴⁴ In addition, Geneva agreed not to transfer, assign, or relinquish its 180-day exclusivity right.¹⁴⁵ By blocking Geneva's 180-day exclusivity period from tolling, these

134. Analysis to Aid Public Comment, *In re Abbott Laboratories and Geneva Pharmaceuticals, Inc.*, File No. 981 0395 (Federal Trade Commission 2000), available at <http://www.ftc.gov/os/2000/03/genevaabbpttanalysis.htm> (last visited Jan. 27, 2003) [hereinafter Abbott/Geneva Analysis to Aid Public Comment].

135. Alvin J. Lorman, *FDA/Patent Law Intersection: What's New With Hatch-Waxman*, PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY COURSE HANDBOOK SERIES 337, 452 (Practicing Law Institute 2001).

136. Complaint, *In re Abbott Laboratories and Geneva Pharmaceuticals, Inc.*, File No. 981 0395 (Federal Trade Commission 2000), available at <http://www.ftc.gov/os/2000/03/abbottcmp.htm> (last visited Jan. 27, 2003) [hereinafter Abbott/Geneva Complaint].

137. Abbott/Geneva Analysis to Aid Public Comment, *supra* note 134.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

provisions ensured that no other generic could enter the market after obtaining FDA approval for a generic version of Hytrin during the term of the agreement.¹⁴⁶ In exchange, Abbott agreed to pay Geneva \$4.5 million per month until the district court decision in the infringement action.¹⁴⁷ If the court found in favor of Geneva, Abbott further agreed to pay \$4.5 million monthly into an escrow account during the appeal process.¹⁴⁸

The terms of this deal were quite favorable to both sides. Geneva projected earnings of \$1 million to \$1.5 million per month if they entered the market with a generic.¹⁴⁹ With the deal in place, Geneva would earn \$3 million to \$3.5 million above its projections. Abbott, in turn, forecasted that they would lose \$185 million in Hytrin sales during the six months subsequent to generic entry.¹⁵⁰ Thus, Abbott preserved their earnings by settling with Geneva.

In the fall of 1999, the FTC initiated an investigation into the Geneva/Abbott settlement. Adopting a "rule of reason" analysis,¹⁵¹ the FTC's complaint stated that the parties' conduct unreasonably restrained and injured competition by preventing and discouraging entry of a generic form of Hytrin.¹⁵² The FTC did not find the agreement to be justified by any countervailing efficiency.¹⁵³ Additionally, the FTC found that the agreement exceeded any likely remedy available to the parties under a court-ordered preliminary injunction.¹⁵⁴ Finally, the complaint alleged that the agreement was formed without weighing the equities or considering whether Abbott would succeed on the merits of the infringement suit or suffer any irreparable harm.¹⁵⁵ Hence, the FTC brought violations under Section 5 of the FTC Act that included: an unreasonable restraint of trade, monopolization of the relevant market by Abbott, conspiracy to monopolize the relevant market on the part of Abbott and Geneva, and unfair methods of competition.¹⁵⁶ In light of the FTC's action, Geneva and Abbott terminated their agreement.¹⁵⁷

The parties entered into a consent agreement to remedy the unlawful conduct charged in the complaint.¹⁵⁸ Under the consent order, Abbott and Geneva are barred from entering into agreements in which the first ANDA filer agrees to 1)

146. Lorman, *supra* note 135, at 452.

147. Abbott/Geneva Analysis to Aid Public Comment, *supra* note 134.

148. *Id.*

149. *Id.*

150. *Id.*

151. M. Howard Morse, *FTC Challenges Payments by Branded Drug Manufacturers to Generic Manufacturers to Stay Out of Market*, FDLI UPDATE, Oct. 2000, at 23, available at <http://www.fdl.org/pubs/Update/2000/issue5.pdf> (contending that the FTC utilized a "rule of reason" rather than a "per se" analysis in evaluating the Abbott/Geneva settlement agreement).

152. Abbott/Geneva Complaint, *supra* note 136.

153. *Id.*

154. Abbott/Geneva Analysis to Aid Public Comment, *supra* note 134.

155. *Id.*

156. *Id.*

157. Abbott/Geneva Complaint, *supra* note 136.

158. Abbott/Geneva Analysis to Aid Public Comment, *supra* note 134.

relinquish or transfer its 180-day exclusivity period or 2) not bring a non-infringing product to market.¹⁵⁹ In addition, the court must approve any agreement, which contains terms involving payments to keep a generic off the market, created during the pendency of patent litigation and involving either Abbott or Geneva as a party.¹⁶⁰ The parties must notify the FTC of any such agreements thirty days in advance of forming the agreement.¹⁶¹ Lastly, Geneva was required to waive its 180 days of exclusivity, thereby enabling other generics to market a generic form of Hytrin.¹⁶²

B. Aventis/Andrx

Another FTC antitrust investigation involved an agreement between Aventis, formerly Hoechst Marion Roussel, and Andrx Corporation. Andrx was the first to file an ANDA for a generic version of Cardizem CD, a once-a-day diltiazem product used to treat hypertension and angina pectoris.¹⁶³ The FTC charged that Aventis paid Andrx over \$80 million to refrain from marketing any competing product—infringing or non-infringing—during the pendency of patent litigation.¹⁶⁴ The complaint noted that Aventis preserved its Cardizem CD sales, which amounted to more than \$700 million per year, by forming this interim agreement with Andrx.¹⁶⁵ In addition, the complaint further alleged that Andrx agreed not to withdraw its pending ANDA or to relinquish or otherwise compromise any right accruing under its ANDA, including its 180-day exclusivity.¹⁶⁶ Similar to a term in the Abbott/Geneva agreement, this term would block another of generic Cardizem CD from entering the market for the agreement period. Applying Section 5 of the FTC Act to the conduct of the parties, the FTC lodged violations that mirrored those in the Abbott/Geneva case.¹⁶⁷ Likewise, the ultimate consent orders entered against Aventis and Andrx contain relief similar to that offered to Abbott/Geneva.¹⁶⁸

C. Schering-Plough/Upsher-Smith Laboratories/American Home Products

More recently, on March 30, 2001, the FTC filed an administrative complaint

159. Decision and Order, *In re Abbott Laboratories and Geneva Pharmaceuticals, Inc.*, File No. 981 0395 (Federal Trade Commission 2000), available at <http://www.ftc.gov/os/2000/03/abbott.do.htm> (last visited Jan. 27, 2003).

160. *Id.*

161. *Id.*

162. *Id.*

163. Administrative Complaint, *In re Hoechst Marion Roussel, Inc.; Carderm Capital L.P.; and Andrx Corporation*, File No. 981 (Federal Trade Commission 2000), available at <http://www.ftc.gov/os/2000/03/hoechstandrexcomplaint.htm> (last visited Jan. 27, 2003) [hereinafter *Aventis/Andrx Complaint*].

164. Lorman, *supra* note 135, at 348.

165. *Aventis/Andrx Complaint*, *supra* note 163.

166. *Id.*

167. *See id.*

168. *See id.*

against Schering-Plough, Upsher-Smith Laboratories and ESI Lederle, a division of American Home Products ("AHP"), for agreements involving Schering's K-Dur 20 drug product. K-Dur 20 is a potassium chloride supplement used to treat patients with low potassium levels.¹⁶⁹ This condition commonly occurs in people taking drugs to treat high blood pressure. Low potassium levels may lead to cardiac problems.¹⁷⁰ Schering's 1998 sales of K-Dur 20 exceeded \$220 million,¹⁷¹ and the company projected that the first year of generic competition would reduce sales by \$30 million.¹⁷²

The FTC alleged that Schering and Upsher-Smith settled a patent infringement lawsuit by private agreement.¹⁷³ Under the terms of such agreement, Upsher-Smith agreed not to sell the product for which it sought FDA approval or any other generic version of K-Dur 20 until September 2001.¹⁷⁴ In exchange, Schering paid Upsher-Smith \$60 million.¹⁷⁵ Schering also received licenses to market five Upsher-Smith products.¹⁷⁶ The FTC contended that these products were, however, of little value to Schering¹⁷⁷ and that the \$60 million payment had little relation to these products.¹⁷⁸

Through a second agreement, Schering settled another patent infringement action against AHP. Schering paid up to \$30 million to AHP in exchange for AHP's promise not to market any generic version of K-Dur 20 until January 2004.¹⁷⁹ In addition, ESI Lederle agreed to market only one formulation of K-Dur 20 between January 2004 and September 2006 and to refrain from assisting any other company in studies necessary for an ANDA.¹⁸⁰ Schering also purchased licenses for two of AHP's generic products.¹⁸¹ The FTC asserted that payment was really made for AHP's delayed entry, not for the value of the products.¹⁸²

169. Press Release, Federal Trade Commission, FTC Charges Schering-Plough over Allegedly Anticompetitive Agreements with Two Other Drug Manufacturers (Apr. 2, 2001), at <http://www.ftc.gov/opa/2001/04/schering.htm>.

170. *Id.*

171. Administrative Complaint, *In re* Schering-Plough Corporation, Upsher-Smith Laboratories, and American Home Products, Docket No. 9297, at 5 (Federal Trade Commission 2001), available at <http://www.ftc.gov/os/2001/04/scheringpart3cmp.pdf> (last visited Jan. 27, 2003).

172. *Id.*

173. *Id.* at 6.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* (noting that Schering never sold four of the five licensed products, made minimal sales of the fifth, and did not expect to sell any more of the five products).

178. *Id.*

179. *Id.* at 7-8.

180. *Id.* at 8.

181. *Id.*

182. *Id.* (noting that Schering made no sales of the two products as of the date of the complaint).

The FTC's complaint against the three parties contained charges similar to those made against Abbott/Geneva and Aventis/Andrx. It charged that Schering, Upsher-Smith, and AHP violated Section 5 of the FTC Act by attempting to unreasonably restrain trade and conspiring to monopolize the potassium chloride supplement market in the United States.¹⁸³

Trial against the parties commenced on January 23, 2002, before Administrative Law Judge ("ALJ") D. Michael Chappell.¹⁸⁴ The FTC entered into a consent agreement with AHP in February 2002.¹⁸⁵ The agency agreed to drop charges that AHP signed an illegal patent deal with Schering in exchange for AHP's promise to avoid making potentially anti-competitive agreements with other drug companies and to notify the FTC before entering into certain other types of agreements in the future.¹⁸⁶ More specifically, the proposed orders prohibit AHP from entering two categories of conduct: (1) agreements in which the NDA holder makes payments to the first ANDA filer and this filer agrees not to market its product for some period of time (except in certain limited circumstances); and (2) agreements between the NDA holder and ANDA filer in which the generic competitor agrees not to enter the market with a non-infringing generic product.¹⁸⁷ These proposed orders apply to AHP in its role as either an NDA holder or an ANDA filer. In April 2002, the FTC approved the order, thereby withdrawing its litigation against AHP.¹⁸⁸

In June 2002, ALJ Chappell rendered an initial decision against Schering and Upsher-Smith.¹⁸⁹ The opinion dismissed all allegations that the two companies engaged in unfair methods of competition. Similarly, ALJ Chappell also dismissed similar separate charges against Schering stemming from an agreement with AHP.¹⁹⁰ He held that the complaint counsel did not "prove or properly define" the relevant product market and that Schering did not have a monopoly power in the relevant market as properly defined.¹⁹¹ In addition, ALJ Chappell found that the evidence failed to prove that the agreements delayed competition

183. *Id.* at 9.

184. Initial Decision, *In re* Schering-Plough Corporation, Upsher-Smith Laboratories, and American Home Products, Docket No. 9297 (Federal Trade Commission 2002), *available at* <http://www.ftc.gov/os/ajsp/d9297/020627.pdf> (last visited Apr. 6, 2003) [hereinafter Schering/Upsher-Smith/AHP Initial Decision].

185. Press Release, Federal Trade Commission, FTC Agreement with American Home Products Corp. Would Protect Consumers from Anticompetitive Practices, Feb. 19, 2002, *at* <http://www.ftc.gov/opa/2002/02/ahp.htm>.

186. *Id.*

187. Decision and Order, *In re* Schering-Plough Corporation, Upsher-Smith Laboratories, and American Home Products, Docket No. 9297 (Federal Trade Commission 2002), *available at* http://www.ftc.gov/os/2002/04/schering-plough_do.htm (last visited Mar. 27, 2003).

188. Schering/Upsher-Smith/AHP Initial Decision, *supra* note 184.

189. Press Release, Federal Trade Commission, Administrative Law Judge Dismisses FTC Allegations of Anticompetitive Conduct by Schering-Plough and Upsher-Smith (July 2, 2002) *at* <http://www.ftc.gov/opa/2002/07/schering.htm>.

190. *Id.*

191. *Id.*

or that the payments from Schering to Upsher-Smith and AHP, respectively, were not to settle the infringement case and for drugs licensed to Schering.¹⁹² The FTC immediately appealed this decision. The appeal is currently pending.

D. From the Perspective of Innovators and Generics: Why Settle?

Beyond the specifics of these three case studies, settlements are attractive to both innovators and generics for economic reasons. Innovators hope to delay the entry of generic competitors to preserve their profit margins.¹⁹³ For example, Glaxo earns nearly \$4.4 million for every day—approximately \$3,044 for each minute—that their antidepressant Paxil avoids generic competition.¹⁹⁴ The price of the first generic drug to enter the market is lower than the price of the approved drug. Studies indicate that the first generic typically enters the market at seventy to eighty percent of the price of the corresponding brand.¹⁹⁵ Subsequent generics cause the price to drop even lower. According to the Generic Pharmaceutical Association, “[w]hen they first hit the market, generics typically cost about [twenty-five] percent less than brand-name equivalents. But after the six-month exclusivity period often granted to the first generic firm to receive approval, the price drops within the next two years to about [forty] percent less”¹⁹⁶ For instance, Barr Laboratories earned \$365 million from sales of a generic version of Prozac during its period of exclusivity.¹⁹⁷ In the three months after its exclusivity period ended, Barr’s Prozac sales fell to \$2.5 million. Nevertheless, innovators typically do not lower prices to meet those offered by generics in an effort to thwart generic competition.¹⁹⁸ From the generics’ perspective, they will not enjoy the same profit margin as innovators for the same volume of sales because of the flood of generic products to the market after the initial exclusivity period ends.¹⁹⁹ This creates an incentive for the generic manufacturer to settle because the first generic to enter a market may share the innovator’s profits, rather than compete with the innovator and ultimately, other generics.

Innovators also hesitate to expose the validity of a patent in a litigation

192. *Id.*

193. See Thomas B. Leary, *Antitrust Issues in the Settlement of Pharmaceutical Patent Disputes, Part II*, Address at the American Bar Association Healthcare Program (May 17, 2001) at <http://www.ftc.gov/speeches/leary/learypharmaceuticalsettlement.htm> (last visited Jan. 27, 2003).

194. Charles Ornstein, *Law Keeps Generics In Limbo; Drug Makers Deny Abusing Patent Rules*, DALLAS MORNING NEWS, June 24, 2001, at 1A, available at LEXIS, News File.

195. Congressional Budget Office, *How Increased Competition from Generic Drugs Has Affected Prices and Returns in the Pharmaceutical Industry* (July 1998), available at <http://www.cbo.gov/Studies&Rpts.cfm>.

196. Singer, *supra* note 12.

197. Christopher Elser, *Generic Drugmakers May Outpace Rivals as Patents End*, Sept. 4, 2002, at <http://quote.bloomberg.com>.

198. Leary, *supra* note 193; see also *Senate Judiciary Hearing, supra* note 62 (statement of Molly Boast, Director, Bureau of Competition, Federal Trade Commission).

199. See Leary, *supra* note 193.

setting. If the patent is truly valid, then the innovator is entitled to monopoly profits.²⁰⁰ A settlement in this situation will transfer a portion of the innovator's profits to a generic challenger, undercutting those rightfully claimed by the innovator. If a patent is invalid, however, then the patent holder is not rightfully entitled to such monopoly profits.²⁰¹ Thus, a settlement readily avoids exposing an invalid patent.²⁰² An undercut of profits in this context is, consequently, the lesser of two evils for an innovator; consumers will continue to pay monopoly profits and innovators will continue to receive such improper profits.

Furthermore, generics may be reluctant to engage in patent litigation, regardless of the strength or weakness of its validity or non-infringement position, because of the risk of losing the suit.²⁰³ If a generic loses, it may be held liable for damages and potentially for attorney fees or treble damages if the court find the infringement to be willful. At the same time, innovators may shy away from litigating against generics in fear that the generics will be unable to pay damages.²⁰⁴

E. From the Perspective of the FTC: Response to Settlement Agreements

To address both the serious questions raised by the Abbott/Geneva, Aventis/Andrex, and Schering-Plough/Upsher-Smith Laboratories/ESI Lederle investigations and recent statistics concerning the number of generics to enter the market prior to patent expiration, the FTC designed a study to assess the practices of innovators and generics.²⁰⁵ Particularly, "[t]he purpose of the study [was] to examine the extent to which the 180-day marketing exclusivity and thirty-month stay provisions of the [Hatch-Waxman] Act have encouraged generic competition or facilitated the use of anti-competitive strategies."²⁰⁶ It therefore focused solely on the procedures to achieve generic drug market entry prior to expiration of the patents protecting the brand-name drug. It did not address other ways for generic entry or the patent term restoration features of the Hatch-Waxman Act.

In April 2001, the Office of Management and Budget approved the study, and the FTC issued seventy-five special subpoenas to twenty-eight innovators and over fifty generics for documents and information pursuant to Section 6(b) of the

200. Thomas B. Leary, Antitrust Issues in Settlement of Pharmaceutical Patent Disputes, Address at Sixth Annual Health Care Antitrust Forum, Northwestern University School of Law (Nov. 3, 2000), at <http://www.ftc.gov/speeches/leary/learypharma.htm> (last visited Jan. 27, 2003).

201. *Id.*

202. *Id.*

203. *Id.*

204. *House Energy and Health Hearing*, *supra* note 5 (statement of Dr. Gregory Glover, Partner, Ropes & Gray, on behalf of Pharmaceutical Researchers and Manufacturers of America).

205. FTC STUDY, *supra* note 67, at ii.

206. Federal Trade Commission, Agency Information Collection Activities; Submission for OMB Review; Comment Request, at <http://www.ftc.gov/os/2001/02/v000014.htm> (last visited Oct. 13, 2001).

FTC Act.²⁰⁷ For innovators, the subpoenas focused on brand-name drugs that were the subject of Paragraph IV certifications filed by generic competitors.²⁰⁸ In turn, the subpoenas for generics centered on drug products for which ANDA applications containing Paragraph IV certifications had been filed.²⁰⁹

Based on the collected data, the FTC released its report in July 2002 and suggested two primary changes to the Hatch-Waxman Act. First, it recommended that the Hatch-Waxman Act be amended to permit only one automatic thirty-month stay per drug product per generic entry application.²¹⁰ The study discovered that an innovator may receive multiple thirty-month stays if the it lists additional patents in the Orange Book after a generic files its first ANDA. The generic must re-certify to each later-listed patent. Upon notice of this re-certification, the innovator may then sue again on each patent within forty-five days to trigger additional thirty-month stays for resolution of this subsequent litigation.

The FTC found that this situation has occurred for eight drugs since 1992, resulting in four to forty months delay beyond the first thirty-month stay.²¹¹ And, in all four of the cases decided before a court thus far, it noted that the additional patent has been found either invalid or not infringed by the ANDA.²¹² The FTC consequently concluded that a single thirty-month stay does not pose significant delay to generic drug entry because the FDA typically needed this amount of time to review and approve the ANDA.²¹³ Nevertheless, it determined that multiple thirty-month stays would prevent generic entry, given the four to forty month delays seen thus far.²¹⁴ It also concluded that allowing a single thirty-month stay per drug would eliminate improper Orange Book listings made only to avail unwarranted thirty-month stays.²¹⁵

Second, the FTC supported the DCA, which mandates innovators to give copies of certain agreements that relate to the 180-day exclusivity to the FTC and DOJ.²¹⁶ The FTC found that the FDA granted the 180-day exclusivity for thirty-one of the 104 ANDA filings containing Paragraph IV certifications from 1992 through 2000.²¹⁷ Moreover, during this period, it found that the parties settled the ANDA-patent litigation on twenty occasions, fourteen of which had the potential to delay the start of the generic's exclusivity.²¹⁸ Because the FDA may not

207. Lorman, *supra* note 135, at 455.

208. *Id.* The brand-name drugs included: Capoten, Cardizem CD, Cipro, Claritin, Lupron, Neurontin, Paxil, Pepcid, Pravachol, Prilosec, Procardia XL, Prozac, Vasotec, Xanax, Zantac, Zocor, Zoloft, and Zyprexa. FTC STUDY, *supra* note 67, at ii.

209. *Id.*

210. *Id.* at iii.

211. *Id.*

212. *Id.*

213. *Id.* at iv.

214. *Id.*

215. *Id.* at v.

216. *Id.* at vi. *See infra* Section IV, Part B.

217. FTC STUDY, *supra* note 67, at vi.

218. *Id.* at vii.

approve other ANDAs until the first 180-day exclusivity period tolls, the FTC determined that the 180-day exclusivity period in itself does not create a bottleneck to subsequent generic entry.²¹⁹ Rather, it determined that such a bottleneck may result when an innovator and generic agree to avoid triggering the 180-day exclusivity by entering a entering private settlement.

After the release of the FTC recommendations, President George W. Bush acted by proposing a new FDA regulation to speed generic drug approvals. He introduced this legislation on October 21, 2002. President Bush explained in support of his proposal that “[t]he average brand name drug costs more than \$72 per prescription” while “the average price for generic drugs . . . was less than \$17 per prescription.”²²⁰

This regulation contained three key provisions. The first provision implemented the FTC’s recommendation to allow only one thirty-month stay per generic drug application.²²¹ The second provision tightened the Orange Book patent listing process in attempt to ensure that only appropriate patents are listed.²²² Specifically, patents that claim packaging, metabolites, intermediates, and unapproved uses may not be submitted under proposed regulation because they do not claim the approved drug product.²²³ Where packaging is integral to the delivery of the approved drug, however, a patent directed to such product may be listed. This provision would continue to permit patents on active ingredients, formulations, and uses of a drug to be submitted.²²⁴ The third provision sought to clarify the requirements for submission of patent information into the Orange Book, and thereby eliminate ambiguity and improper listings.²²⁵ Particularly, this provision requires an innovator to supply specific information and complete a checklist format for each patent listed. Declarations containing false information will be sent to the DOJ for review. The FDA approved this regulation in its entirety, and it will become effective on August 18, 2003.

219. *Id.* at viii. The FTC did suggest clarifying the circumstances that trigger the 180-day exclusivity, namely: (1) specifying that marketing includes the first generic’s marketing of the brand-name drug; (2) codifying that any court decision is sufficient to start the running of the 180-day exclusivity; and (3) clarifying that a court decisions dismissing a declaratory judgment action for lack of subject matter jurisdiction constitutes a “court decision” to start the running of the 180-day exclusivity. *Id.* at ix-xi.

220. President George W. Bush, Remarks by the President on Prescription Drugs (Oct. 21, 2002), *available at* <http://www.whitehouse.gov/news/releases/2002/10/print/20021021-2.html>.

221. Applications for FDA Approval to Market a New Drug Patent Listing Requirements and Application of 30-Month Stays on Approval of Abbreviated New Drug Applications Certifying That a Patent Claiming a Drug is Invalid or Will Not be Infringed; Proposed Rule 21 C.F.R. §§ 314.94(a) & 314.52(a) (2002).

222. *Id.* §314.53(a).

223. *Id.*

224. *Id.* § 314.53(b).

225. *Id.* § 314.53(c).

IV. PROPOSED LEGISLATION BEFORE THE 107TH AND 108TH CONGRESSES

A. *The Greater Access to Affordable Pharmaceuticals Act*²²⁶

In the face of ballooning price differences between brand-name and generic drugs,²²⁷ Senator Charles Schumer introduced bi-partisan legislation, known as S. 54 or more commonly as the McCain-Schumer proposal, before the 108th Congress on January 7, 2003.²²⁸ Twenty-one other senators are co-sponsoring this bill.²²⁹ It will reform the Hatch-Waxman system by amending the Federal Food, Drug, and Cosmetic Act. According to the language of the GAAP, it is intended “1) to increase competition, thereby helping all Americans, especially seniors and the uninsured, to have access to more affordable medications; and 2) to ensure fair marketplace practices and deter pharmaceutical companies (including generic companies) from engaging in anti-competitive action or actions that tend to unfairly restrain trade.”²³⁰ The Congressional Budget Office estimates that this legislation would reduce drug spending by \$60 billion over the next ten years.²³¹ Given its broad purpose and support, it may catalyze changes in the Hatch-Waxman system that have been sought by generics and discouraged

226. The GAAP, originally sponsored by Senators John McCain and Charles Schumer and Representatives Sherrod Brown and JoAnn Emerson, was first introduced before the 107th Congress in May 2001. *Hatch-Waxman Reform Will Benefit Industry and Patients*, DRUG STORE NEWS (Aug. 20, 2001) [hereinafter Hatch-Waxman Reform]. It was designated S. 812 and H.R.1862, respectively, by the Senate and House. It passed in the Senate in July 2002 and was forwarded to the House for introduction in September 2002. House Democrats launched a discharge petition to force a floor vote on the bill. Julie Rovner, *US Lawmakers Try to Force Vote on Generic Drug Bill*, Sept. 18, 2003, available at <http://abcnews.com>. Simultaneously, innovators ran newspaper advertisements featuring a photo of a child getting drugs injected through an intravenous line with the comment, “Pray for a miracle, because generic drugs will never cure him.” *Id.* The GAAP was held at the desk and not introduced to the House prior to session close.

227. Hatch-Waxman Reform, *supra* note 226 (noting that the difference in average price between a brand and a generic is \$46 compared to \$17 ten years ago); *see also* Press Release, Sen. John McCain, McCain, Schumer Unveil Initiative to Save Consumers \$71 Billion on Prescription Drugs (May 1, 2001), at <http://mccain.senate.gov/mccain>. The press release stated that consumers save sixty percent over average when they choose a generic over a brand drug. Under the generic scheme, consumers could purchase a generic version of Prilosec, an ulcer medicine, for \$57.60 instead of a brand prescription for \$143.99. Likewise, a consumer could spend \$49.88 for a generic version of Zocor, a cholesterol lowering medication, rather than \$124.71 for a brand prescription. *Id.*

228. Schumer Press Release, *supra* note 21.

229. Co-sponsoring senators include: Jeff Bingaman, Susan M. Collins, Mark Dayton, Richard J. Durbin, Russell D. Feingold, Edward M. Kennedy, Mary Landrieu, John McCain, Bill Nelson, John F. Reed, Debbie Stabenow, Hillary Rodham Clinton, Thomas A. Daschle, Byron L. Dorgan, John Edwards, Tim Johnson, Herb Kohl, Patrick J. Leahy, Zell Miller, Mark Lunsford Pryor, and Jay Rockefeller.

230. S. 812, 107th Cong. § 2(b) (2001).

231. Schumer Press Release, *supra* note 21.

by innovators for years.

The proposed bill contains numerous provisions designed to make delayed entry of generic drugs quite difficult. First, the bill requires the first ANDA applicant to forfeit the 180-day exclusivity period to the next-filed applicant if the first applicant 1) reaches a financial settlement with an innovator to stay out of the market until the patents expire; 2) fails to market their generic within ninety days from the date that the ANDA becomes effective; 3) withdraws their ANDA application; 4) fails to obtain FDA approval within thirty months; 5) fails to challenge a new patent within sixty days; or 6) is found to have engaged in anti-competitive activities.²³² Second, the bill eliminates the automatic thirty-month stay for subsequently issued patents, in effect allowing only one thirty-month stay per brand-name drug.²³³ Third, the bill requires patent holders to list all of a drug's relevant patents in the FDA's Orange Book and to certify that the list is complete and accurate.²³⁴ Fourth, the bill bars an applicant from filing a civil action for patent infringement if the applicant failed to timely register its patents with the FDA.²³⁵ Fifth, the bill permits a generic to file a civil action to correct or delete patent information in the Orange Book.²³⁶ Finally, the bill disregards an applicant's ability to pay damages from a court's consideration of whether to provide injunctive relief before the expiration of the thirty-month stay.²³⁷

While the GAAP as embodied in S. 54 presently stands before the Senate Committee on Health, Education, Labor, and Pensions,²³⁸ Senators McCain, Schumer, Kennedy, and Gregg introduced a revised bipartisan version of the GAAP as S. 1225 on June 10, 2003, before the Senate Committee on Health, Education, Labor, and Pensions.²³⁹ This revision, referred to as the Gregg-Schumer proposal, attempts to address a number of the criticisms lodged against the McCain-Schumer proposal. Senator Schumer said,

This legislation uses a market-based approach that doesn't cost the government a penny and gives the drug industry a desperately needed dose of competition. It's all about easing the burden on everyday people who are forced to rely on higher-priced name brand drugs because no cheaper alternative is available.²⁴⁰

232. S. 54, 108th Cong. § 5(a)(2) (2003).

233. *Id.* § 4(a)(1).

234. *Id.* § 3(a)(2).

235. *Id.* § 3(a)(1).

236. *Id.* § 4(a)(1).

237. *Id.* § 6.

238. S. 54 Bill Summary & Status, at <http://thomas.loc.gov/cgi-bin> (last visited Mar. 17, 2003).

239. Joanne Kenen, *Key Senators Agree on Generic Drug Bill*, *Forbes*, June 4, 2003, available at <http://www.forbes.com/newswire/2003/06/04/rtr991184.html>.

240. Press Release, Sen. Charles Schumer, Gregg-Schumer Generic Drug Amendment Passes Full Senate (June 19, 2003) at http://www.senate.gov/~schumer/SchumerWebsite/pressroom/press_releases/PR01804.pf.html.

Particularly, S. 1225 simplifies S. 54 into four key sections. First, the bill, like S. 54, permits an innovator to utilize only one thirty-month stay.²⁴¹ Second, it creates forfeiture provisions for the 180-day exclusivity period similar to S. 54.²⁴² Third, unlike S. 54, the bill enables the FDA to establish separate tests for determining the bioequivalence of drugs which are not absorbed into the bloodstream.²⁴³ Lastly, S. 1225 does not specify which patents may be listed in the Orange Book. Nevertheless, to ensure that innovators do not list frivolous patents to stall generic competition, the bill permits generics to file counter-claims against an innovator if the innovator sues them for violating a listed patent.²⁴⁴ In essence, this provision establishes an enforcement mechanism to regulate Orange Book listings. S. 54 did not provide for such enforcement. This proposal was overwhelmingly passed in the Senate on June 19, 2003, by a vote of 94-to-1.²⁴⁵

B. The Drug Competition Act

Besides the GAAP, several legislators also introduced the DCA, which targets "sweetheart deals"²⁴⁶ that delay the entry of low-cost generics onto the market. The Senate bill, S. 754, was sponsored by Senator Patrick Leahy, the ranking member of the Senate Judiciary Committee, and co-sponsored by Senator Herb Kohl, the ranking member of the panel's Antitrust Subcommittee, and Senators Charles Schumer, Richard Durbin, and Russell Feingold.²⁴⁷ On the House side, the bill, H.R. 1530, was co-sponsored by Representative Henry Waxman, the ranking member of the House Government Reform Committee and a senior member of the House Commerce Committee, and co-sponsored by Representatives Marion Berry, Peter Deutsch, Fortney "Pete" Stark, and Sherrod Brown.²⁴⁸ Senator Leahy said, "If Dante were writing *The Inferno* today he would find a special place for those who devise anti-consumer conspiracies to gouge the public. Stifling competition hurts seniors and families and cheats healthcare providers, and it hits taxpayers through higher Medicare and Medicaid costs."²⁴⁹ Senator Waxman further commented, "This drug company collusion against consumers has got to stop. These payoffs from one company to another help no sick people get well. They just make patients' medical bills higher. The first step to stopping this collusion is to expose it. Once it's public, no one can defend it."²⁵⁰ Thus, the DCA was crafted

241. S.1225, 108th Cong. §2(C) (2003).

242. *Id.* § 3.

243. *Id.* § 4.

244. *Id.* § 2(aa).

245. Schumer Press Release, *supra* note 240.

246. *Sweetheart Deals*, *supra* note 25.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

1) to provide timely notice to the Department of Justice and the Federal Trade Commission regarding agreements between companies with patent rights regarding branded drugs and companies which could manufacture generic versions of such branded drugs; and 2) by providing timely notice, to enhance the effectiveness and efficiency of the enforcement of the antitrust and competition laws of the United States.²⁵¹

In terms of application, the new bill will allow the FTC and DOJ to monitor private sales or marketing agreements between innovators and generics in the context of an ANDA with a Paragraph IV certification and subject them to immediate FTC and DOJ investigation and action.²⁵² That is, an innovator and a generic, which enter into a private agreement regarding either (1) the manufacture, marketing, or sale of a generic that potentially would compete with either the brand name drug or (2) the 180-day exclusivity period, must file the texts of such agreements with the FTC and the Attorney General.²⁵³ In addition, the parties must explain purpose and scope of the agreement and discuss whether the agreement could delay, restrain, limit, or in any way interfere with the production, manufacture, or sale of the generic in question.²⁵⁴ Moreover, the parties must file this explanation and discussion within ten business days after the agreement is executed.²⁵⁵ Otherwise, the parties may be subject to a civil penalty of \$10,000 per day of non-compliance.²⁵⁶

On October 18, 2001, the Senate Judiciary Committee approved the DCA by voice vote.²⁵⁷ The FTC then specifically recommended passage of this bill when it released its report on the generic pharmaceutical marketplace in July 2002.²⁵⁸ The Senate, in turn, passed the DCA on November 18, 2002 and referred it to the House Committee on the Judiciary.²⁵⁹ Congress closed session, however, before the House voted on this bill.

251. S. 754, 107th Cong. § 3 (2001).

252. Lorman, *supra* note 135, at 348.

253. S. 754 § 5.

254. *Id.*

255. *Id.* § 6.

256. *Id.* § 7.

257. *Senate Panel Approves Bill on Generic Drug Availability*, NAT'L J. CONG. DAILY, Oct. 18, 2001 [hereinafter Senate Panel].

258. *See infra* Section III, Part E.

259. Press Release, Sen. Patrick Leahy, Senate Passes Leahy Bill Targeting Sweetheart Deals That Delay Low-Cost Generic Drugs (Nov. 19, 2002), at <http://www.senate.gov/~leahy/press/200211/111902.html>.

V. FULL CIRCLE: DO THE INTENTIONS BEHIND THE
HATCH-WAXMAN ACT SURVIVE?

A. *The Greater Access to Affordable Pharmaceuticals Act—Poisoning
the Hatch-Waxman System*

Today, the U.S. pharmaceutical market is robust, competitive, and working to the benefit of consumers and patients. As such, the Hatch-Waxman balance has not tipped in favor of either generics or innovators. The reconstructive surgery proposed by Senators McCain, Schumer, and Gregg is simply not necessary. In fact, the changes contained in the GAAP may destroy the tender compromise achieved in 1984.²⁶⁰

Generics flourish as a result of the Hatch-Waxman Act. The 1984 law revoked the trade secret status accorded to an innovator's safety and efficacy data and allowed a generic to show only bioequivalence to the innovator product. As a result, a generic may avoid the huge expense of clinical trials and only spend a small fraction of that amount to show bioequivalence. Further, in overruling the *Roche v. Bolar* decision, the Hatch-Waxman Act enabled generics to establish bioequivalence during the patent life of the innovator's product. Thus, a generic may be prepared to market as soon as the patent protection around an innovator's product expires. Moreover, the Hatch-Waxman Act instituted the ANDA process to facilitate generic entry into market.

Before 1984, generic competition did not begin until three to five years after the innovator's patent expired.²⁶¹ When the law took effect, generics flooded the FDA with 800 applications in the first seven months.²⁶² Today, generic copies are almost immediately available as soon as an innovator's patent expires.²⁶³ In fact, "[o]f the approximately 10,000 brand name prescriptions drugs available, 9,000 have generic equivalents."²⁶⁴ Additionally, the generic industry's share in the prescription drug market has jumped from less than twenty percent to almost fifty percent since 1984.²⁶⁵ Given that pharmacists fill more than one billion prescriptions with generic medications, generics are eating a larger serving of the profits.²⁶⁶ In fiscal year 2000, Barr Laboratories and Teva Pharmaceutical

260. Provisions to be analyzed in this section are common to both S. 54 and S. 1225. Accordingly, use of the term "the GAAP" hereafter may refer to either proposed bill.

261. *House Energy and Commerce Hearing*, supra note 5 (statement of Dr. Gregory Glover, Partner, Ropes & Gray, on behalf of Pharmaceutical Researchers and Manufacturers of America).

262. Sheryl Gay Stolberg & Jeff Gerth, *Keeping Down the Competition; How Companies Stall Generics and Keep Themselves Healthy*, N.Y. TIMES, July 23, 2000, available at <http://www.nytimes.com/library/national/science/health/072300hth-generic-drugs.html>.

263. *Id.*

264. Marjorie Wertz, *Consumers Question Generic Drugs; Doctor Knows Best*, PITT. TRIB.-REV., Feb. 4, 2002, available at http://www.pittsburghlive.com/x/tribune-review/health/s_15624.html.

265. *House Energy and Commerce Hearing*, supra note 5 (statement of Dr. Gregory Glover, Partner, Ropes & Gray, on behalf of Pharmaceutical Researchers and Manufacturers of America).

266. Wertz, supra note 264.

Industries, two of the largest generics, realized a return on revenues of ten percent and 8.5%, respectively.²⁶⁷ Comparatively, the eleven firms in the Fortune 500 drug industry earned an 18.6% return.²⁶⁸ Thus, both their speed to market and revenue earnings suggest that generics are not struggling anorexically behind the innovator drug companies.

The Hatch-Waxman system also preserved incentives for innovators while nourishing the generic industry. The 1984 law allows for partial patent term restoration for the time lost in clinical testing and FDA review. The total time is, however, limited to a maximum of five years, even if this amount of time is lost during drug development and review. In addition to the partial restoration, the 1984 law prohibits the FDA from approving a generic copy of an innovator's new chemical entity ("NCE") until five years after the NCE's approval date. Furthermore, the law also creates a procedure for litigating patent disputes prior to FDA approval of an infringing generic.

Indeed, innovators continue to develop novel and efficacious medications. In 2001 alone, pharmaceutical and biotechnology companies developed thirty-two new medicines—twenty-four drugs and eight biologics—to combat diseases that cost society over \$250 billion a year in other health care costs, lost productivity, and wages.²⁶⁹ Presently, innovators have over 1000 new medicines in the development pipeline—these include more than 400 for cancer, more than 200 to meet the special needs of children, more than 100 each for heart disease and stroke, mental illnesses, and AIDS, twenty-six for Alzheimer's disease, nineteen for arthritis, sixteen for Parkinson's disease, and fourteen for osteoporosis.²⁷⁰ As well, "America not only leads the world in investing in medical research and development, it is also the nation where patients benefit the most from that research the fastest."²⁷¹ A survey of new drug launches in twenty-two developed countries revealed that all of the one hundred new medicines developed by American pharmaceutical companies were launched in the United States from 1997 to 1999. In contrast, sixty-six of those drugs reached patients in the United Kingdom, and only forty-three reached patients in Canada during that same three year period. Thus, innovators are steadily turning scientific advances into life-saving medicines for the benefit of ailing patients.

Nevertheless, if the GAAP is adopted, it will introduce various provisions into the law to suffocate innovation. First, it will limit an innovator to avail only a single automatic thirty-month stay regardless of the number of separate patents challenged by generics. The 1984 law afforded, however, special treatment to patent litigation in the ANDA context because the Hatch-Waxman Act overruled the *Roche v. Bolar* decision. Under the holding of *Roche v. Bolar*, a generic

267. *Generic Drugs. The Stalling Game*, 66 CONSUMER REPORTS 36, July 2001, available at LEXIS, News File.

268. *Id.*

269. PhRMA Press Release, *supra* note 5.

270. *House Energy and Commerce Hearing*, *supra* note 5 (statement of Dr. Gregory Glover, Partner, Ropes & Gray on behalf of Pharmaceutical Researchers and Manufacturers of America).

271. Pharmaceutical Research and Manufacturers of America, *Americans Patients Have More Timely Access to New Medicines*, at <http://www.phrma.org/updates/2002-02-19.346.phtml>.

would have been barred from conducting any form of product development that could potentially have been deemed patent infringement until the innovator's patent expired. Congress designed the thirty-month stay provision as a trade-off for enabling generics to engage in product development prior to the expiration of the innovator's patent. No other United States industry offers a competitor such a competitive advantage.²⁷² Thus, Senators McCain, Schumer, and Gregg cannot reasonably assert that the special provision for patent litigation should be limited and, at the same time, advocate that a generic may continue development activities that would otherwise constitute patent infringement.

Moreover, if a subsequent generic challenger is not forced to adhere to the thirty-month stay, then such generic may enter the market as soon as the FDA grants ANDA approval. Subsequent generics consequently have greater incentives to file ANDAs with Paragraph IV certifications and trigger litigation under the proposed the GAAP than in the present system. An innovator's only recourse, in turn, is to file for a preliminary injunction to block the subsequent generic until a court decision on the merits of the infringement suit.

The Federal Circuit applies a four-factor test in deciding whether to grant preliminary injunctive relief in a patent infringement suit. "[A] party must prove four factors: (1) its reasonable likelihood of success on the merits; (2) irreparable harm to its interests; (3) the balance of hardships tipping in its favor; and (4) public interest."²⁷³ In proving its probability of success on the merits, the patent holder must meet the standard of a "clear showing."²⁷⁴ The holder may do so by establishing evidence of either (1) prior adjudication of validity in a suit by the patent holder against another party or (2) acquiescence by the industry to the patent holder.²⁷⁵ In addition, the patent holder must show that the generic's product will infringe²⁷⁶—one of the central issues in the ensuing Hatch-Waxman litigation spawned by the Paragraph IV certification. Additionally, to evaluate the proof of infringement offered by the patent holder, the court may need to engage in a patent claim construction exercise.²⁷⁷ Such exercise may involve an in-depth, time-consuming review of the specification, inquiry into the scope of the invention, investigation of the prior art, and consideration of the prosecution history.²⁷⁸ Finally, the patent holder must establish that he will suffer irreparable harm if the injunction is denied. If the patent holder can obtain full compensation through money damages, then the court will deem that holder will not suffer such harm.²⁷⁹ This determination may indeed be difficult for a court to make given the speculative nature of monetary damages.

Once a patent holder establishes both probable success and irreparable harm,

272. *House Energy and Commerce Hearing*, *supra* note 5 (statement of Dr. Gregory Glover, Partner, Ropes & Gray, on behalf of Pharmaceutical Researchers and Manufacturers of America).

273. *Glaxo v. Ranbaxy Pharm.*, 262 F.3d 1333, 1335 (Fed. Cir. 2001).

274. *See Atlas Powder Co. v. Ireco Chemicals*, 773 F.2d 1230, 1233 (Fed. Cir. 1985).

275. DONALD S. CHISUM, *CHISUM ON PATENTS* § 20.04 (2001).

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

then the trial court has great discretion whether to issue an injunction.²⁸⁰ The court balances the hardships that the parties will suffer from granting the injunction versus withholding the injunction.²⁸¹ In addition, the court will consider the effects on third parties and the public interest. Typically, the public interest will not seriously be effected by the grant or denial a preliminary injunction in a patent infringement case, even the in the pharmaceutical industry.²⁸² Specifically, in *Eli Lilly and Company v. Premo Pharmaceuticals Labs*, the court reasoned that

[a]lthough companies such as Premo . . . might be able to undercut the prices offered by pharmaceutical manufacturers . . . this type of short-term competition does not, at least in the considered opinion of Congress, serve the public interest. Instead, Congress has determine that it is better for the nation in the long-run to afford the innovators of novel, useful, and nonobvious products short-term monopolies.²⁸³

Additionally, preliminary injunctions may be a risky maneuver for the patent holder based on statistical data. A study surveyed 252 patent disputes across six federal district courts between January 1, 1990, and June 30, 1991, and found that forty-eight patent holders (nineteen percent) requested preliminary injunctions.²⁸⁴ The courts granted this relief in only twelve of the twenty-three cases (fifty-two percent) that proceeded through a ruling on the request. Thus, an innovator will bear a heavy and risky burden since the "preliminary injunction may be the most striking remedy wielded by contemporary courts."²⁸⁵

If the court refuses to grant a preliminary injunction, then a generic may opt to market their version of the branded drug. The innovator's profit margin of the innovator will plummet as a result of this generic competition. Thus, an innovator will suffer unjustly in many ways if the court ultimately upholds the validity of the challenged patent in favor of the innovator. First, the innovator will lose both profits from the sales of its patented drug for the period of the infringement and the loyalty of the patient population who convert to the generic. Second, despite its right to force the generic to withdraw its infringing product from the market, the innovator will unlikely to resort to such action for ethical reasons. Specifically, the innovator is, in theory, entitled to reclaim its market share wrongfully disturbed by the generic. However, in reality, enforcement by the innovator would only hurt patients who by then rely on the lower-cost generic.

Therefore, faced with inequitable treatment under the law and threat of increased litigation resulting from the thirty-month stay limitation, innovators

280. *Id.*

281. *Id.*

282. *Id.*

283. 630 F.2d 120, 138 (3d Cir. 1980).

284. Jean O. Lanjouw & Josh Lerner, *Tilting the Table? The Use of Preliminary Injunctions*, 44 J. LAW & ECON. 573, 594-95 (Oct. 2001).

285. John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 525 (1978).

may decrease the number of dollars dedicated to R&D. This is especially probable because innovators will potentially encounter these challenges in as little as four years after a drug hits the market. For example, although Eli Lilly and Company's compound and method patent for Zyprexa, a schizophrenia treatment drug, does not expire until 2011 in the United States, already three patent challengers have filed ANDAs between the fourth and fifth year post-product launch.²⁸⁶ The innovator will only be in the early stages of recouping development costs for a particular drug at this four-year time point, and such costs are quite staggering. In 2002, Tufts University researchers targeted the figure to be \$897 million from inception to market launch.²⁸⁷ Thus, while still recouping these R&D costs, innovators will be forced to bear the extreme cost of patent litigation. Bruce L. Downey, Chairman and CEO of Barr Laboratories acknowledged, "We invest literally millions of dollars in these patent challenges."²⁸⁸ Likewise, Robert A. Armitage, Senior Vice President and General Counsel for Eli Lilly and Company, said that a full-blown patent litigation can cost a drug manufacturer \$5 million to \$10 million in outside attorney fees alone.²⁸⁹ Hence, in direct frustration of the intent of the original Hatch-Waxman Act, the \$30 billion spent on bringing life-saving medications to market will undoubtedly dwindle with each new patent challenge.

Second, in addition to limiting the thirty-month stay, the GAAP will require the first ANDA applicant to forfeit the 180-day exclusivity period to the next-filed applicant if the first applicant delays market entry of the generic. From the innovator's perspective, this provision will also injure innovation and aggravate the goals of the Hatch-Waxman Act. The 180-day exclusivity is a precious bounty awarded to the first ANDA applicant to either commercially market a generic product or receive a favorable court decision in a patent infringement action. Presently, "multiple challenges to the same patent have become commonplace."²⁹⁰ Three, four, or sometimes five generics may line up to challenge patents on blockbuster drugs, even though only the first generic to challenge is eligible for the exclusivity.²⁹¹ If this bounty is transferable as it will be under the GAAP, an even larger number of generics will file ANDAs in hopes

286. Prescription Pharmaceuticals and Biotechnology (also known as "The Pink Sheet"), available at <http://www.thepinksheet.com>.

287. Press Release, Tufts Center for the Study of Drug Development, Total Cost to Develop a New Prescription Drug, Including Cost of Post-Approval Research, is \$897 Million (May 13, 2003), at <http://csdd.tufts.edu/NewsEvents/RecentNews.asp>; see also Press Release, Tufts Center for the Study of Drug Development, Tufts Center for the Study of Drug Development Pegs Cost of a New Prescription Medicine at \$802 Million (Nov. 30, 2001), at <http://csdd.tufts.edu/NewsEvents/RecentNews.asp>. The average cost of new drug development in 1987 was \$231 million. Had costs only increased at the rate of inflation, the average cost would have been \$318 million in 2000.

288. *House Energy and Commerce Hearing*, *supra* note 5.

289. Morrison, *supra* note 287.

290. Engelberg, *supra* note 28, at 416.

291. *House Energy and Commerce Hearing*, *supra* note 5 (statement of Rep. W.J. "Billy" Tauzin, Chairman, House Committee on Energy and Commerce).

of winning the 180-days of exclusivity directly, or alternatively, of standing as the first runner-up in the event that the first ANDA delays market entry. As well, many of these generics will file Paragraph IV certifications in their ANDAs. Innovators, consequently, will be confronted with a steady stream of patent challengers. As mentioned earlier in this section, patent litigation is intensely expensive and will quickly deplete the dollars that innovators have available for R&D.

Thus, the GAAP deliberately overturns tradeoffs so tenuously negotiated by representatives from PMA and GPIA in the summer of 1984. "There is almost nothing in McCain-Schumer that is going to create more innovation."²⁹² The true solution to enable all Americans, especially seniors, disabled persons, and the uninsured, to have greater access to more affordable pharmaceuticals is a Medicare prescription drug benefit. Uninsured persons, like Ms. Rubin,²⁹³ are not criticizing innovators for developing new medications. Instead, such persons are really concerned with the cost of these new medications. Recall that Ms. Rubin said, "It's so costly. I don't have a drug plan, and I pay full price."²⁹⁴ Affordability is the predominant issue for Americans, not the thirty-month stay or 180-day exclusivity provisions. Affordability may be turned into a reality through good prescription drug insurance. Congress therefore should be focused on enacting a bill to accomplish this coverage. Their present efforts with the GAAP are misdirected.

B. The Drug Competition Act—Supplementing the Hatch-Waxman System

The DCA contains much narrower legislation than the GAAP. It does not aim to amend the Hatch-Waxman Act or slow down the drug approval process.²⁹⁵ Rather, according to Senator Orrin Hatch, it seeks to enable "government . . . [to] take a hard look at efforts to keep generic drugs off the market."²⁹⁶ Particularly, the bill singles out private agreements between innovators and generics and subjects these agreements to scrutiny by the FTC and DOJ. In scrutinizing agreements, the Agencies will not squelch the right to contract, but will block those settlements that gouge antitrust and competition principles. Therefore, the motivation behind the DCA parallels the purpose of the Hatch-Waxman Act, which sought to make lower-costing generic copies of brand drugs more widely available to consumers.

Indeed, the time is past due for such legislative action to keep the spirit of Hatch-Waxman strong. The recent glamorized settlements between Abbott/Geneva, Aventis/Andrx, and Schering/Upsher-Smith/ESI Lederle²⁹⁷ have simply called the public's attention to a long-standing abuse of antitrust law.

292. Morrison, *supra* note 287 (quoting Robert A. Armitage, Senior Vice President and General Counsel for Eli Lilly and Company).

293. See *supra* notes 12-13 and accompanying text.

294. *Id.*

295. *Sweetheart Deals*, *supra* note 25.

296. Senate Panel, *supra* note 257.

297. See *infra* Section II.

Deals between innovators and generics started shortly after the Hatch-Waxman Act was passed in 1984. For example, one of the earliest Hatch-Waxman skirmishes involved Merck & Company's popular muscle relaxant Flexeril. Merck accused Schein Pharmaceuticals of patent infringement pursuant to a Paragraph IV certification. In the patent litigation, the district judge ruled in favor of Schein. According to Mr. Albert B. Engelberg, the attorney who represented Schein and who also represented generic manufacturers in writing the Hatch-Waxman Act, the victory changed the legal dynamic surrounding Hatch-Waxman.²⁹⁸ In the wake of Schein's victory, Mr. Engelberg said that an innovator offered to settle a separate case by giving Schein cash payments to stay off the market, a tactic similar to the one used by Abbott with Geneva.²⁹⁹ He also revealed that the settlement was kept secret and therefore, he would not disclose the details.³⁰⁰

On the other hand, Congress's heightened concern may not be justified. The FTC and DOJ are adequately and actively monitoring settlements between innovators and generics for anti-competitive terms under existing law as demonstrated by the recent actions taken against Abbott/Geneva, Aventis/Andrx, and Schering/Upsher-Smith/ESI Lederle. Next, the number of Hatch-Waxman patent challenges from 1984 through January 2001 was quite small compared to the number of ANDA applications. Generics filed 8259 ANDA applications, but only 478 of these applications raised a patent issue, either challenging patent validity or claiming non-infringement.³⁰¹ Additionally, only fifty-eight court decisions involving just forty-seven patents have been issued to resolve generic challenges to innovator patents.³⁰² As well, only three of the patent disputes involving a settlement between the innovator and generic companies have been challenged by the FTC,³⁰³ namely Abbott/Geneva, Aventis/Andrx, and Schering/Upsher-Smith/ESI Lederle. In other words, a scant 0.036% of the ANDA applications filed in the past seventeen years have resulted in settlements challenged by the FTC. Considering these actual figures, perhaps the media has incited needless worry by overdramatizing the volume of settlements.

Public policy typically favors settlements. Court dockets are overcrowded, and settlements lower transaction costs for the parties by avoiding the expenses of litigation.³⁰⁴ Mr. Charles T. Lay, a former vice president and chief executive at Geneva, stated that litigation drives up the cost of developing a generic from \$500,000 a decade ago to more than \$5 million today.³⁰⁵ Settlements may likewise create results that accommodate the mutual interests of both parties.³⁰⁶

298. Stolberg & Gerth, *supra* note 262.

299. *Id.*

300. *Id.*

301. *House Energy and Commerce Hearing*, *supra* note 5 (statement of Dr. Gregory J. Glover, Partner, Ropes & Gray, on behalf of Pharmaceutical Researchers and Manufacturers of America).

302. *Id.*

303. *Id.*

304. *Id.*

305. Stolberg & Gerth, *supra* note 262.

306. *House Energy and Commerce Hearing*, *supra* note 5 (statement of Dr. Gregory J. Glover,

In contrast, litigation generally favors only the interest of one party. Also, without the distraction and costs of litigation, innovators can focus on researching and developing new drug products. This innovator R&D, in turn, translates into growth of the generic industry. Thus, consumers ultimately benefit by having both new innovator medicines and generic copies available.

Countervailing arguments exist though to show why settlements in the context of Hatch-Waxman differ from settlements in regular patent litigation. In normal litigation, the public trusts an alleged infringer to be the strongest competitor of a patent holder in favor of consumers.³⁰⁷ Generics no longer favor consumers in Hatch-Waxman settlements. Their interests diverge from consumers' interests as soon as innovators drop dollars into their pocketbooks.³⁰⁸ Effectively, generics are paid to be weak competitors.³⁰⁹ For this reason alone, public policy cannot truly support settlements stemming from Hatch-Waxman litigation.

What is more, if the FTC and DOJ scrutinize agreements under the DCA, then the validity of the patent underlying the whole dispute will undoubtedly surface. If such patent is valid, then private agreements with generics not to compete are not anti-competitive because innovators have the "right to exclude others from making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States."³¹⁰ Private agreements may actually benefit generics and consumers by providing additional funds to generics that may be devoted to developing other generic drugs. Hence, innovators may actually fund generics to become stronger competitors. Indeed, in this context, the goals of Hatch-Waxman are readily advanced.

The true problem surfaces, however, when the patent is either clearly invalid or its validity is uncertain. In these circumstances, innovators do not have exclusionary rights, and agreements not to compete are likely violations of antitrust laws. Patent validity is not readily ascertainable though; it involves complex legal determinations. According to Thomas B. Leary, former FTC Commissioner,

[T]he Commission is extremely ill equipped to determine on its own whether patents are valid or not. Theoretically, it could decide the issue on the basis of the parties' own evaluations, as disclosed by internal documents or testimony. . . . [However], [c]ompanies with sophisticated counsel can generate documents that are helpful either in patent litigation or in defense of a settlement.³¹¹

Partner, Ropes & Gray, on behalf of Pharmaceutical Researchers and Manufacturers of America).

307. Dr. Suzanne Michel, Address at Antitrust in the Pharmaceutical Industry: A Brown Bag Series, *Cutting Edge Issues in Government Pharmaceutical Investigations and Litigation: An In-Depth Look at In the Matter of Schering-Plough Corporation et. al., New York v. Bristol-Myers Squibb Co. and What Comes Next* (Feb. 20, 2002) (notes on file with author).

308. *Id.*

309. *Id.*

310. 35 U.S.C. § 154(a)(1) (2000).

311. Leary, *supra* note 193.

Conclusively, because of the integral nature of patent validity in determining the anti-competitive nature of an agreement and the difficulty in assessing such validity, the FTC and DOJ will be subjected to a sincerely complex task. This task quickly may overwhelm their systems.

Lastly, if an innovator pays a generic to delay market entry, the public must consider the length of this delay. The public cannot automatically presume terms that mention delay make the agreement anti-competitive. If the delay does not preclude market entry beyond the date when a generic could enter if victorious in patent litigation, then it is not anti-competitive. The generic really would have no right to enter the market until a court rules that its drug product would not infringe the innovator's patent or that such patent is invalid. Nevertheless, a delay that postpones generic entry beyond the point when a generic could enter the market if victorious in the patent litigation would certainly be anti-competitive. The innovator in such instance will maintain market power illegally because the generic has a right to enter the market and in this manner adversely harm competition.

CONCLUSION

Living in the aftermath of the Hatch-Waxman Act for seventeen years, innovators and generics are sounding cries of abuse across the United States. In Washington, D.C., the FTC and DOJ are likewise ringing alarms at private treaties formed between innovators and generics to govern the entry of generic drugs onto pharmacy shelves. In response, the 107th and 108th Congresses are considering legislation to reform the Hatch-Waxman system, restore the provisions of the 1984 law to meet the original intent of the drafters, and quiet industry players.

The GAAP seeks to increase competition, ensure fair marketplace practices, and deter innovators and generics from engaging in anti-competitive practices or actions that tend to unfairly restrain trade. This proposed legislation severely fails to preserve the tender Hatch-Waxman balance achieved in 1984. It instead unreasonably tip the balance toward the generics' side. Such a tip is unnecessary because the Hatch-Waxman Act is working efficiently to both encourage generics and embrace innovators.

On the other hand, the DCA supplements the original Hatch-Waxman Act by protecting the availability of lower-costing generic copies of brand drugs through enforcement of antitrust and competition principles. Congress need not wait until ninety-nine percent of all ANDA applications result in private settlements before taking action. Any settlement that delays generic entry inevitably thwarts the original drafters' intent. Congress needs, however, to include more guidance to the FTC and DOJ on how to evaluate settlements for anti-competitive terms given the intricate patent validity considerations and particular ways that delays may be used.

In conclusion, the 108th Congress will not facilitate innovation by passing the GAAP. They will instead poison the pharmaceutical industry. When the House considers this proposed legislation in the coming months, hopefully they will vote against it. To truly accomplish greater access to affordable pharmaceuticals, the 108th Congress should pass a Medicare prescription drug

benefit. Seniors, disabled persons, and the uninsured will then be able to directly rely on insurance to pay for their prescription drugs. Additionally, the 108th Congress should resurrect and pass the DCA to keep competition alive in the drug marketplace.

PERSONAL PRIVACY ON THE INTERNET: SHOULD IT BE A CYBERSPACE ENTITLEMENT?

BRIAN KEITH GROEMMINGER*

“[N]ever has our ability to shield our affairs from prying eyes been at such a low ebb.”¹

INTRODUCTION

Jane signs onto the Internet, preparing for what most would deem a typical, innocuous Web browsing experience. Jane purchases some clothing for herself and her two- and five-year-old children on an up-scale department store’s Web site. She then follows with an extended review of a Web site featuring weight loss plans.

Although most would consider this browsing experience a litany of mundane transactions, a savvy direct marketer with the ability to covertly monitor these activities considers the information obtained priceless. As surprising as it may be to many Web surfers, assembling an alarmingly detailed profile of Jane, without her knowledge or consent, is quite possible with a single browsing activity such as the one previously outlined. Although this scenario requires some inferences, a marketing profile of Jane’s transactions might develop as follows: Jane is a mother with two young children, purchases some up-scale goods, and is seriously concerned about her weight and health. Based on her, a merchant or vendor might want to send Jane advertisements, e-mails, banner, advertisements, or pop-up advertisements that offer expensive home exercise equipment. The equipment would allow her to stay at home with her children, aid with her fitness goals, and be affordable based on her observed consumer spending pattern.

An advertisement for exercise equipment may not bother Jane at all. In fact, she may actually be interested in home exercise equipment instead of a different ad that would have been randomly posted on her computer screen as she browsed the Web. However, Jane might be very disturbed by the covert means employed by the merchants to collect, aggregate, use, and/or sell her personal information without asking her for permission or notifying her of their intent to use the information in that manner.

The scenario depicts the rising tension between one’s personal privacy and the marketing interests of merchants in the exploding technological megaplex of the Internet.² This Note will explore this fragile balance of interests and the

* J.D. Candidate 2003, Indiana University School of Law—Indianapolis; B.S., 1992, Indiana State University; M.B.A., 1994, Indiana State University. I would like to thank Professor James Nehf for his insight and guidance throughout the development of this Note.

1. *Bernstein v. Dep’t of Justice*, 176 F.3d 1132, 1146 (9th Cir. 1999).

2. For purposes of this Note, privacy is defined as “the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.” Kent Walker, *Where Everybody Knows Your Name: A Pragmatic Look at the Costs of Privacy and the Benefits of Information Exchange*, 2000 STAN. TECH. L. REV. 2, 6

tempestuous debate regarding the appropriate line of demarcation between the collection of personal data and individual privacy rights.

Part I of this Note discusses the technological means employed by Web sites to collect personal information from their Web site visitors. Part II of this Note explores the opposing views regarding cyberspace privacy. Part III discusses the various approaches employed to protect individuals and their privacy rights. Part IV analyzes the current U.S. framework of self-regulation and its implications and results. Part V reviews some current proposed solutions to the Internet privacy dilemma. Finally, Part V proffers a new solution regarding Internet privacy, a market-determined balance between e-commerce interests and individual privacy interests.

I. MONITORING ON THE INTERNET

A. *Dissection of an Internet Transaction*

Without burrowing too deeply into the technological nuances of Internet architecture, it is important to understand the mechanics involved in a typical Internet transaction in order to understand how one's privacy can be so easily surrendered in cyberspace. Basically, Internet activities are composed of electronic requests for information and subsequent electronic fulfillment of those requests.³ In other words, a surfer's mouse "click" initiates a submission of an electronic request to view data on a Web site, the site's computer receives the electronic request, and finally, the site sends the requested data to the specific computer making the request.⁴ In order to send the information to the correct computer among the millions logged onto the Internet, the Web site must be able to distinguish the computer requesting data from all other online computers. An Internet protocol (IP) address, which is basically a specific machine address assigned by the Web surfer's Internet service provider (ISP) to a user's computer, accomplishes this task.⁵ Hence, every time a transaction requesting or sending data occurs on the Web this unique IP address accompanies the data.⁶ Furthermore, both the ISP and the Web site typically log these transactions.⁷ To the detriment of users' personal privacy and anonymity on the Web, however, the uniqueness of the IP address may allow someone in possession of another user's IP address to find detailed personal facts about the user, such as the user's name, address, birth date, social security number, and e-mail address, within minutes.⁸

(2000) (quoting ALAN WESTIN, *PRIVACY AND FREEDOM* 7 (1967)).

3. Lawrence Jenab, *Will the Cookie Crumble?: An Analysis of Internet Privacy Regulatory Schemes Proposed in the 106th Congress*, 49 U. KAN. L. REV. 641, 643 (2001).

4. *Id.* at 643-44.

5. Shawn C. Helms, *Translating Privacy Values with Technology*, 7 B.U. J. SCI. & TECH. L. 288, 295 (2001). Examples of ISPs include America OnLine (AOL) and Earthlink.

6. *Id.* at 296.

7. Jenab, *supra* note 3, at 644.

8. Jessica J. Thill, *The Cookie Monster: From Sesame Street to Your Hard Drive*, 52 S.C.

B. Cookies and Clickstreams

Another common method of surreptitiously collecting data from users is through the use of small text files commonly known as cookies.⁹ Web sites place these files on the computer hard drives of Web site visitors during Internet transactions.¹⁰ A cookie file contains a unique identification number which allows a Web site to recognize and distinguish the user in subsequent visits to the site.¹¹ Cookies also typically store information such as user preferences, the type of browser software or operating system used, installed plug-ins, and password or login information which allow for easier Web site browsing by the user in future visits.¹² However, cookies have a dual-personality potential because they can abrogate an individual's privacy in cyberspace by collecting information regarding the user and his or her behavior.¹³

Cookies accomplish their darker-sided agenda in several ways. First, a Web site can retrieve cookies at a future time.¹⁴ When the Web site does this, the cookie can disclose a detailed list of all Web sites that a specific computer visited within a particular time frame.¹⁵ Embedded within these cookie files may be telltale information that can identify a user personally, such as a user's name,

L. REV. 921, 923 (2001). These transactions are usually invisible to the individual user on the Internet.

9. Helms, *supra* note 5, at 297.

10. According to a Business Week/Harris Poll telephone survey of 1014 adults conducted in March 2000, sixty percent of computer users had never heard of cookies. Heather Green et al., *Business Week/Harris Poll: A Growing Threat* (March 20, 2000), available at http://businessweek.com/2000/00_12/b3673006.htm.

11. Anna E. Shimanek, *Do You Want Milk with Those Cookies?: Complying with the Safe Harbor Privacy Principles*, 26 J. CORP. L. 455, 459 (2001).

12. Thill, *supra* note 8, at 923.

13. Rachel K. Zimmerman, *The Way the "Cookies" Crumble: Internet Privacy and Data Protection in the Twenty-first Century*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 439, 443 (2000-01). Cookies can be categorized into four basic types: visitor, preference, shopping basket, and tracking. Visitor cookies, also referred to as counters, record the number of times a specific computer visits a Web site. Preference cookies, as their name suggests, save Web page settings chosen by the user, such as specific colors or stocks in a user's personal portfolio. Shopping basket cookies assign the user an identification number in order to maintain a record of items the user selects while shopping at the site. Tracking cookies, the variety that predominantly exhilarate direct marketers and distress privacy advocates, assign an identification value upon an initial visit to a Web site containing a banner advertisement and subsequently track other sites visited by the computer bearing that unique identification value. See Nelson A. Boxer, *Are Your Corporation's Cookies Private?*, CORP. COUNS. 1 (May 1999).

14. See, e.g., Zimmerman, *supra* note 13, at 443. For a real-time example of some data a simple cookie file can accumulate, see <http://www.junkbusters.com/cgi-bin/privacy> (demonstrating that a simple mouse click transmits more information than most surfers realize).

15. *Id.*

password, e-mail address, and other personal information.¹⁶ In the past, only the Web site that placed the cookie could read the file; however, now the use of cookie sharing between sites or the use of placement ads by the same ad agency allows cookies from multiple Web sites to be aggregated to create a comprehensive personal profile of an individual user.¹⁷ Second, some cookies have the capability to record the Web site from which a user came, the links accessed at the site, and any personal information entered at the site.¹⁸ A Web site may also use these types of cookies in concert with a more efficient, and yet more intrusive, technique for gathering personal data known as "clickstreams."¹⁹ A clickstream is basically a recording of all Web sites a user visits during the same session or connection.²⁰ Clickstream collections not only gather a list of sites visited, but also the duration spent on each site, purchases made, advertisements viewed, and data entered.²¹ Internet service providers usually perform clickstream monitoring, because users have essentially rented a line from the provider to connect to the Internet.²² Lastly, some cookies may be able to identify the IP address of the computer, which could lead to the ultimate disclosure of the location of the computer used to access the site.²³

II. COMPETING PERSPECTIVES OF CYBERSPACE MONITORING

A. Pro-Business Aspects

The allure of Web-based marketing is threefold: the ability to collect personal information with unprecedented expanse, detail, speed, and ease, the ability to reduce marketing and distribution costs, and the ability for smaller firms to sell products and collect marketing data.²⁴

16. *Id.*

17. Shimanek, *supra* note 11, at 460. This process is typically achieved through banner ads owned by the same company. Zimmerman, *supra* note 13, at 445.

18. Zimmerman, *supra* note 13, at 443.

19. Shimanek, *supra* note 11, at 460.

20. *Id.* For an example of how cookies and clickstreams operate in concert to develop detailed information regarding the user's Web transactions, see Jenab, *supra* note 3, at 645.

21. Shimanek, *supra* note 11, at 460. This e-surveillance technique is tantamount in the real world to a person secretly following you as you shopped in brick-and-mortar stores, recording what you reviewed, what you bought, and other information about you and your preferences. Andrew Shen, *Request for Participation and Comment from the Electronic Privacy Information Center (EPIC)* 18, available at http://www.epic.org/privacy/internet/Online_Profiling_Workshop.PDF (last visited Feb. 15, 2002).

22. Zimmerman, *supra* note 13, at 446. Due to a provider's position in the electronic channel and the service they provide, clickstream monitoring is accomplished with relative ease. *Id.*

23. *Id.* at 444. The dangerous potential of gathering this type information was discussed in the previous section of this Note.

24. Shaun A. Sparks, *The Direct Marketing Model and Virtual Identity: Why the United States Should Not Create Legislative Controls on the Use of Online Consumer Personal Data*, 18

Using one or a combination of electronic data collection techniques, marketers can capture not only purchase data when Internet users enter information into Web forms to obtain quotes or complete on-line sales transactions, but also invaluable non-purchase “window-shopping” habits of consumers.²⁵ Also, each subsequent “click” of the mouse may provide the database marketer with further information about the Web surfer. Electronic collection of the information allows Web sites to collect innumerable pieces of individual information with which to develop a solid profile of a particular Web user, and database marketers can run statistical models or other analytical software programs to quickly assemble target lists.²⁶ What may have taken weeks or months in paper form may take mere seconds or minutes in its electronic counterpart. Thus, what may have been cost and time prohibitive to many marketers is now quick and simple, encouraging a prudent business to leverage the technology to its fullest advantage by acquiring as much data as possible—the better the profile, the better the prospect.

Many of the traditional costs disappear in Web-based transactions, especially costs associated with targeted marketing campaigns. First, the costs of collecting masses of personal data are reduced, as much of the data is voluntarily given or surreptitiously gathered.²⁷ Second, marketers can develop more precise profiles of potential customers, thereby customizing mailings and developing one-on-one customer relationships.²⁸ Marketers, armed with this powerful information, can change product mixes or limit the number of mailings to those customers that they deem most profitable or most likely to purchase.²⁹ A marketer can then use electronic means to communicate to these customers, further reducing the marketing costs to the business.³⁰ In many cases, an e-mail or banner ad can substitute for a sales catalog or flyer, the number of customer service representatives can be reduced, and the costs associated with low-response blanket mailings can be eliminated.³¹ Efficient and effective data collection and profiling allows businesses to better match the right people with the right products, and at the same time reduces efforts and costs associated with both less-targeted mass mailing campaigns and more-targeted campaigns for which

DICK, J. INT'L L. 517, 527 (2000).

25. *Id.* at 529.

26. *See id.* at 528-29. Even seemingly pedestrian demographic data can yield strong individual profiles. “Data triangulation” is a process through which small, singular data items on an individual user (e.g., one’s date of birth) are matched to a larger, more complete database (e.g., a public records database) to create complete profiles that are then sold to others, such as direct marketers. Letter from Jason Catlett, President, Junkbusters Corp. to Secretary of Federal Trade Commission, *available at* <http://www.ftc.gov/bcp/profiling/comments/catlett.htm> (last visited Nov. 17, 2002).

27. Jenab, *supra* note 3, at 649.

28. Sparks, *supra* note 24, at 529.

29. *See id.*

30. *Id.* at 530.

31. *Id.*

businesses amass the same information through more laborious and costly collection techniques.³²

The Internet also allows companies to efficiently deal directly with the ultimate consumer. As a result, a business can remove many or all of the distribution intermediaries from the chain of distribution, thereby reducing distribution costs to the business. One of the greatest cost advantages to businesses from Internet-based commerce is the ability to reduce the number of people who "touch" the product on its way to the consumer.³³ As a result of the elimination of non-value-added distribution intermediaries, consumers will realize lower prices for goods and increased gains for services.³⁴

Technological advances have transformed data collection via Web sites into a relatively inexpensive endeavor, providing a more efficient means of data mining and profiling of consumers and their needs.³⁵ Because of diminished data collection costs, both small and large businesses can afford to engage in targeted marketing efforts that were once within the exclusive province of deep-pocketed companies with substantial capital commitments to data collection activities.³⁶ With the advent of the Internet, companies selling personal information number in the several thousand.³⁷ As a result, procuring information and information services, once left to only the largest of firms, can now be afforded by individuals.³⁸ Hence, small companies can now conduct target marketing on a level equal with larger companies' target marketing, thereby increasing competition, market efficiency, and ultimately lowering costs.

From the perspective of the database marketer, curtailing data collection increases the risk of stifling the explosive growth and ultimate potential of e-commerce on the Internet.³⁹ In fact, many economic and legal commentaries indicate that "more information is better" and that placing restrictions upon information flow does not maximize social wealth because restrictions inhibit decisionmaking, increase transaction costs, and encourage fraud.⁴⁰ Unfortunately, protecting user privacy becomes a vicious cycle that works

32. See BOB STONE, *SUCCESSFUL DIRECT MARKETING METHODS* 102-03 (3rd ed. 1986).

33. Sparks, *supra* note 24, at 530-31.

34. *Id.* at 531. In a free market economy, businesses, under pressure from competition, will pass some or all of the distribution savings to consumers in an effort to capture business through lower prices.

35. *Id.* at 528.

36. Ann Bartow, *Our Data, Ourselves: Privacy, Propertization, and Gender*, 34 U.S.F. L. REV. 633, 655 (2000).

37. Jeff Sovern, *Opting In, Opting Out, or No Options at All: The Fight for Control of Personal Information*, 74 WASH. L. REV. 1033, 1037 (1999).

38. *Id.* at 1037-38.

39. Sparks, *supra* note 24, at 550. The Internet economy is estimated to grow to \$2.8 trillion in 2003, nearly tripling in size in two years. Seth Safier, *Between Big Brother and the Bottom Line: Privacy in Cyberspace*, 5 VA. J.L. & TECH. 6, 8 (2000).

40. Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 GEO. L.J. 2381, 2382 (1996).

counter to the Internet's direct marketing potential.⁴¹

Consumers will feel the adverse impact of personal data collection restrictions in other ways. Collection of data at Web sites also allows an expansive offering of free Web sites that are subsidized exclusively through ad banners.⁴² Removing or restricting the ability to collect greatly diminishes the value of the ad to the sponsor.⁴³ Hence, many of these free Web sites will be unable to command a large enough premium from the advertisers to continue operating the site free of charge to visitors.⁴⁴

B. Pro-Privacy Aspects

Although not specifically enumerated as a fundamental right in the Constitution, Justice Louis Brandeis once described privacy as "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."⁴⁵ However, even though the right has been recognized within the penumbra of the Constitution of the United States, the Court has also stated that the Fourth Amendment does not provide protection of personal information conveyed to third parties for commercial use.⁴⁶ In fact, the First Amendment of the Constitution and the Commerce Clause have been used as mighty swords to "strike down state laws concerning Internet privacy legislation."⁴⁷

Nonetheless, measures to protect the privacy of personal information on the Internet offer substantial individual, economic, and societal benefits that must be

41. Andrew Leonard, *Your Profile, Please*, SALON NEWSLETTER (June 26, 1997), at <http://archive.salon.com/june97/21st/article.html>. A study commissioned by the Direct Marketing Association indicated direct marketing sales to consumers jumped from \$458 billion in 1991 to \$630 billion in 1996. In that same period, direct marketing business-to-business sales rose from \$349 billion to \$540 billion. Safier, *supra* note 39, at 8.

42. Steven R. Bergenson, *E-commerce Privacy and the Black Hole of Cyberspace*, 27 WM. MITCHELL L. REV. 1527, 1553 (2001).

43. *Id.* Ads certainly are posted to market and sell products, but data collection on individuals who click the ad remains critical as well. This data allows marketers to better understand who "clicks" an ad and also allows marketers to provide target advertising of other products or to employ other methods or channels of advertising to those individuals or groups. This data is quite valuable. One author estimates that one individual's data can be worth up to \$500. Shimanek, *supra* note 11, at 461.

44. Bergenson, *supra* note 42, at 1553 (citing Erika S. Koster, *Zero Privacy on the Internet*, COMPUTER LAW 7 (May 1999)). Privacy may also potentially stagnate efforts to prosecute those who engage in criminal behavior in cyberspace. If officials are unable to bring culpable parties to justice by analyzing Web sites visited or cookies deposited, not only are law enforcement efforts abrogated, but also the inclination to commit non-traceable Internet crimes could be exacerbated. Helms, *supra* note 5, at 294.

45. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

46. Edward Fenno, *Federal Internet Privacy Law*, S.C. LAW., Jan.-Feb. 2001, at 36, 38 (citing *Smith v. Maryland*, 442 U.S. 735, 743-44 (1979)).

47. *Id.*

vigorously protected. First, individuals benefit from the protection of privacy in cyberspace by enjoying the right to be left alone.⁴⁸ A 1996 poll conducted by Equifax and privacy scholar Alan Westin indicated that "89% of those polled in the United States were either very or somewhat concerned about privacy."⁴⁹ Another survey showed ninety-eight percent of respondents felt their privacy was "substantially threatened by advertisers and marketers."⁵⁰ When individuals were queried about Internet privacy, the results spoke once again in favor of personal privacy.⁵¹ Surveys reveal that sixty-four percent of Americans are unlikely to trust Web sites, while ninety percent want the right to control the use of their personal information after collection.⁵²

In addition to the overwhelming concern for protecting personal information collected on the Internet, lack of privacy may actually stagnate the e-commerce economy.⁵³ Today, direct marketing is big business. The industry employs over eighteen million people, is utilized by seventy-seven percent of companies, has grown at approximately twice that of the United State's gross national product, and is expected to generate \$30 billion dollars in commerce by 2002.⁵⁴ Without the ability to choose (or even know) how much privacy will be maintained on a trip into cyberspace, many surfers may be deterred from visiting the Web. In fact, polls reveal that the privacy concern is the top reason why consumers avoid using the Internet.⁵⁵

Finally, intrusive data collection, coupled with the lack of any meaningful choice regarding protection, could lead to avoidance of the Internet as a free-flowing medium of free speech. People may lie to protect their personal data, refuse to answer questions fearing that their answers will become a record in a marketer's database, or avoid the Internet altogether. Privacy protections, therefore, may also protect against untruthful data and self-censorship.⁵⁶

48. Nearly four of five respondents in a recent survey "regard privacy as a fundamental right . . . [similar to] life, liberty, and the pursuit of happiness." Sovern, *supra* note 37, at 1057.

49. Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1196-97 (1998).

50. Sovern, *supra* note 37, at 1057. Numerous surveys indicate that online users distrust e-businesses' requests for personal information. Often, as much as twenty-five percent of the time, users will enter false information when prompted for personal details. As a result, databases will become increasingly corrupted with worthless information unless privacy concerns are addressed in cyberspace. See Leonard, *supra* note 41.

51. Zimmerman, *supra* note 13, at 448.

52. *Id.*

53. See Sovern, *supra* note 37, at 1056.

54. *Id.* at 1047.

55. *Id.* at 1056.

56. See generally Bartow, *supra* note 36, at 655.

III. THE STATUS QUO OF THE LEGAL ENVIRONMENT

A. *U.S. Law on Internet Privacy*

Federal laws only offer limited protection to this new electronic threat to consumer privacy. Although Constitutional claims may lie when the government attempts to collect information on individuals from the Internet,⁵⁷ the private sector has received relatively little attention. To date, no comprehensive legislation exists regarding Internet privacy pertaining to a private enterprise's ability to collect personal information from the Internet. Congress has poised itself as a reactionary to the problem, rather than as a composed, proactive legislator. The underlying rationale of Congress's approach is to minimally inhibit the inertia of the massive economic engine of the Internet and to deal only with issues related to privacy as advocated at that moment.⁵⁸ However, this approach has created fragmented and sparse protections for specific individuals in particular situations, while creating logical inconsistencies across a regulation base without a conceptual infrastructure to fuse them together.⁵⁹ For example, the Video Privacy Protection Act of 1988⁶⁰ prohibits the disclosure of titles of videos rented, yet book purchases may be monitored with impunity.⁶¹ Other regulations that confine data protection to specific segments of industry include the "Electronic Communications Privacy Act, . . . the Tax Reform Act, the Freedom of Information Act, the Right to Financial Privacy Act, the Telephone Consumer Protection Act, and the Federal Records Act."⁶² In October 1998, Congress inched closer to federal regulation of the entire Internet with the passage of the Children's Online Privacy Protection Act (COPPA).⁶³ Although the government continues to enact legislation protecting the Internet privacy rights of certain segments of commerce and consumers, eventually the government may be forced to succumb to the social outcries for total privacy protection for all Internet constituents and enact an all-encompassing privacy

57. See U.S. CONST. amend. IV.

58. See generally Sparks, *supra* note 24.

59. See Zimmerman, *supra* note 13, at 452-53.

60. 18 U.S.C. § 2710 (2000).

61. Zimmerman, *supra* note 13, at 452.

62. *Id.* at 453.

63. 15 U.S.C. §§ 6501-6506 (2000). This Act is the first piece of legislation to protect an entire category of Internet users. COPPA requires Web sites directed towards children and operators with actual knowledge that they are collecting personal information from children to post a notice on their Web site detailing what information is collected and how it is used. The bill also requires that Web site operators gain parental consent, allow for parental review of the information collected, and allow parents to prohibit further use of the information. The Act also requires Web sites and operators to take reasonable steps to protect the confidentiality, security, and integrity of the collected information. Ethan Hayward, *The Federal Government as Cookie Inspector: The Consumer Privacy Protection Act of 2000*, 11 DEPAUL-LCA J. ART & ENT. L. & POL'Y 227, 239 (2001).

statute.⁶⁴

Congress also attempted to protect personal data in telecommunications by passing the Telecommunications Act of 1996. This Act regulates the use of personal information obtained by telecommunications carriers while transacting with and serving their customers.⁶⁵ The FCC interpreted the Act to mean that carriers had to "obtain express permission from customers [an 'opt-in' approach] before using any personal data for certain marketing purposes."⁶⁶ That interpretation was recently challenged, and ultimately failed to withstand constitutional scrutiny in *U.S. West, Inc. v. FCC*.⁶⁷ The court, applying the *Central Hudson* test,⁶⁸ stated that when the government attempts to protect personal data, it must show a proper balancing between the costs and the benefits of legislation restricting use of that information.⁶⁹ Under the *Central Hudson* test regulations mandating a formal opt-in mechanism may also be deemed an unconstitutional restriction on commercial speech.

The FTC has also commenced federal actions regarding privacy rights on the Internet, but the central focus has involved deceptive collection techniques in violation of section 5(a) of the Telecommunications Act.⁷⁰ The FTC first started its Internet privacy enforcement in August 1998 by charging GeoCities with committing deceptive trade practices in violation of section 5(a) of the Act.⁷¹ GeoCities, Inc. was charged with misrepresenting its information collection

64. See Bergenson, *supra* note 42, at 1545.

65. Telecommunications Act of 1996, 47 U.S.C. § 222 (1994).

66. Sparks, *supra* note 24, at 540. An "opt-in" approach requires a Web site visitor to affirmatively grant the Web site permission before it can collect information on the visitor. An "opt-out" approach allows the Web site to collect information about the Web site visitor unless the visitor affirmatively tells the Web site that he or she does not want his or her personal information collected. Jenab, *supra* note 3, at 667.

67. 182 F.3d 1224, 1234-35 (10th Cir. 1999).

68. The *Central Hudson* test was used to determine whether a particular governmental regulation violated the First Amendment right to free commercial speech. The Court outlined four questions that must be analyzed in a particular governmental regulation:

Is the commercial speech concerned with lawful activity, and is the speech misleading?

Is there a substantial state interest in regulating the speech in question?

Does the regulation directly and materially advance that interest?

Is the regulation not overly broad in serving that interest?

If the first question is answered affirmatively, then the rights to lawful speech are balanced against the answers found in the remaining three inquiries. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980).

69. *U.S. West, Inc.*, 182 F.3d at 1239.

70. This part of the Telecommunications Act empowers the Federal Trade Commission to prevent unfair or deceptive acts or practices in or affecting commerce. See 15 U.S.C. § 45 (2000).

71. Stephen F. Ambrose, Jr. & Joseph W. Gelb, *Survey: Consumer Privacy Regulation and Litigation*, 56 BUS. LAW. 1157, 1166 (2001) (citing Complaint, *In re GeoCities, Inc.*, FTC File No. 9823015 (1999), available at 1998 WL 473217 (F.T.C.)).

practices in its privacy statement.⁷² This misrepresentation occurred when GeoCities allegedly sold third parties certain information that consumers entered in their application forms to GeoCities without the consumers' consent, even though GeoCities' privacy statement claimed it would not do so without first obtaining consumer permission.⁷³ Although GeoCities denied all charges, the case was settled in February 1999. The consent order outlined revisions to GeoCities' data information and collection practices, including disclosures of "(I) what information is collected; (ii) its intended uses; (iii) third parties to whom information will be disclosed; (iv) consumer's ability to obtain access to such information; (v) consumer's ability to remove information from GeoCities' databases; and (vi) procedures to delete personally identifiable information from GeoCities' databases."⁷⁴

State law invasion of privacy claims regarding unauthorized information collection on the Internet, much like federal actions, have failed to materialize into any meaningful privacy haven for Internet users. Usually unauthorized data collection actions materialize under invasion of privacy claims. A claim for common law invasion of privacy may be based upon one of four theories: intrusion upon seclusion, public disclosure of private facts, misappropriation of name or likeness for commercial purposes, or publicity that places another in false light.⁷⁵ However, an invasion of privacy claim arising from Internet data collection usually fails because at least one of the requisite elements of an invasion of privacy claim is missing. Intrusion upon seclusion requires the invasion to be highly offensive to a reasonable person.⁷⁶ However, courts have not viewed Internet data collection as such an offensive action, reasoning that an individual could foresee data being collected at a Web site.⁷⁷ Public disclosure of private facts usually does not prevail in covert Internet data gathering techniques because the tort also requires that the disclosure be highly offensive, a step courts have not taken in this arena.⁷⁸ Claims for misappropriation and false light fall even further from the possible realm of a successful tort claim, because these types of invasions of privacy do not apply neatly to the Internet

72. *Id.*

73. *Id.* at 1166-67.

74. *Id.* at 1167.

75. W. PAGE KEETON, PROSSER & KEETON ON TORTS, §117 (5th ed. 1984); RESTATEMENT (SECOND) OF TORTS §§ 652B, 652C, 652D, 652E (1984).

76. KEETON, *supra* note 75, § 117; RESTATEMENT (SECOND) OF TORTS § 652B.

77. Helms, *supra* note 5, at 310. For example, in one case, a group of credit card holders filed a class action suit against the credit card issuer for its alleged intrusion into the cardholders' seclusion. The cardholders' complaint arose because the issuer collected data from the cardholders' use of their credit cards and subsequently rented that information to third parties. The Illinois appellate court dismissed the cardholders' suit based on the fact that the information the issuer had collected and rented was "voluntarily" given and thus the act did not constitute an impermissible intrusion into the cardholder's privacy. *Dwyer v. Am. Express Co.*, 652 N.E.2d 1351, 1353-55 (Ill. Ct. App. 1995).

78. Helms, *supra* note 5, at 311.

data collection issue.⁷⁹

By far, the most publicized state law privacy claim involved DoubleClick, Inc.⁸⁰ DoubleClick, a large Internet advertising agency linked to millions of Internet users, announced in January 2000 its plans to merge its non-personally identifiable database information with its Abacus Online database, a database containing enormous amounts of personally identifiable information.⁸¹ This merger would have enabled DoubleClick to link users' names with their clickstream data.⁸² Litigation ensued, attacking DoubleClick's use of cookies, clickstream surveillance, and practice of obtaining personal information without consumer consent. Among the state claims filed against DoubleClick were "Trespass to Property, Invasion of Privacy, Violation of Unfair Trade Practices Acts, Unjust Enrichment, and violation of various Consumer Protection Acts."⁸³ Ultimately, DoubleClick decided against the data merger, and the case was never fully litigated in a court of law.

B. The European Approach to Privacy on the Internet

The European community has been far more progressive than the United States in the protection of personal information in cyberspace, enacting its comprehensive Data Protection Directive ("Directive") in 1995.⁸⁴ The Directive, which took effect in October 1998, and binds all fifteen-member nations of the European Union (EU), makes no distinction between on-line and off-line environments.⁸⁵ To comply with the Directive, each member state must enact

79. A claim for misappropriation would require that the appropriation be for the value of an individual's personal information. The Illinois appellate court, for example, held that the unauthorized sale or use of an individual's personal profile for marketing purposes had value only because it was associated with the other names on the list. The name itself had no intrinsic value, but the list owner created value through the process of list compilation. Thus, the list owner did not deprive the individual of the value of his or her personal data. *Dwyer*, 652 N.E.2d at 1356. Recovery on a false light claim would only be reasonable when the account, if true, would have been actionable as an invasion of privacy. KEETON, *supra* note 75, § 117.

80. Courtenay Youngblood, *A New Millennium Dilemma: Cookie Technology, Consumers, and the Future of the Internet*, 11 DEPAUL-LCA J. ART & ENT. L. & POL'Y 45, 53 (2001).

81. Shen, *supra* note 21, at 17. Abacus Direct Corporation is an offline company which possesses credit card numbers, personal addresses, telephone numbers, information about household incomes, family compositions, and other information on consumer habits. The power of these companies' data gathering capabilities is astounding. For example, in December 1998, DoubleClick placed cookies with forty-eight million Internet surfers in the United States. Abacus held more than eighty-eight million five-year buying profiles. Combining these data stores would have yielded profound knowledge of personally identifiable online behavior. *Id.*

82. Youngblood, *supra* note 80, at 53.

83. *Id.*

84. James T. Sunosky, *Privacy Online: A Primer on the European Union's Directive and United States' Safe Harbor Privacy Principles*, INT'L TRADE L.J. 80, 82 (2000).

85. *Id.* at 82. The European Union (EU) is a union of fifteen independent countries that

legislation that accomplishes the following objectives: the information collector must obtain consent from individuals before personally identifiable information is collected and used; the information collector must obtain consent from the individual before the information is transferred to a third party (opt-out provision); the information collector must disclose the purpose behind the collection of data; the information collector must provide individuals free access to data about themselves; and the information must provide individuals with a mechanism for correcting false information.⁸⁶

IV. ANALYSIS OF THE CURRENT SELF-REGULATION APPROACH

A. A Coasean Perspective on Privacy Rights

In his seminal article, *The Problem of Social Cost*, Ronald Coase argued that in a world with no transaction costs, it does not matter with whom the property right exists, as people will bargain to attain the right if the cost to attain the right does not exceed the bargained-for price.⁸⁷ As a result, governmental intervention is unnecessary.⁸⁸ If individuals value their privacy but that right is held by the e-businesses, then individuals can purchase the right from e-businesses. However, if the businesses feel the right is worth more than the individuals are willing to pay (i.e., how much they value their privacy), then the businesses will retain the right.⁸⁹ The result is an efficient allocation of resources, regardless of who "controls" the property rights to the personal information. In essence, privacy of information is appropriately valued and given its due consideration in the marketplace.

One reason for self-regulation's failure is a lack of information and understanding of what actually transpires during an Internet visit.⁹⁰ In general,

actively collaborate to enhance the political, social, and economic realms of their countries. Current member include: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, and the United Kingdom of Great Britain and Northern Ireland. See European Union Official Web Site, at http://www.europa.eu.int/index_en.htm (last visited Nov. 11, 2002).

86. Bartow, *supra* note 36, at 662; Joel R. Reidenberg, *Restoring America's Privacy in Electronic Commerce*, 14 BERKELEY TECH. L.J. 771, 783-84 (1999).

87. One article summarizes the Coase Theorem as follows:

If the parties to any actual or potential social arrangement could enter into marketplace transactions with no transactional impediments (costs) of any kind, they would always agree to rearrange their respective obligations in a manner that would lead to a net increase in the productive value of their arrangement if such an increase were possible.

This would hold true irrespective of any rule of liability in effect at the time.

Michael I. Swygert & Katherine Earle Yanes, *A Primer on the Coase Theorem: Making Law in a World of Zero Transaction Costs*, 11 DEPAUL BUS. L.J. 1, 2 (1998) (footnote omitted).

88. *Id.*

89. Sovern, *supra* note 37, at 1067.

90. Obtaining accurate information on current information collection and privacy practices

the individual Web user is blissfully ignorant of the covert data collection experience and many Web sites offer little or no information regarding their collection practices.⁹¹ Without adequate knowledge, the individual usually operates under the false assumption that his or her privacy is protected. Thus, even if transaction costs were removed from the equation (necessary to perfect Coase's theorem), the unequal knowledge of the true nature of the situation prevents the Coasean irrelevance theory from gaining a foothold.⁹² In fact, a Business Week/Harris poll conducted in March 2000 indicates that sixty percent of Internet users have never heard of cookie files.⁹³ Thus, efficient resource allocations cannot be realized because of the consumer's lack of knowledge regarding the collection practices of most Web sites. Without such knowledge, no bargaining regarding privacy of information ensues, and an efficient balance between data collection and privacy is improbable.

B. An FTC Perspective on Self-Regulation

Currently, the U.S. Congress has treated Internet transactions in a laissez-faire fashion, allowing the Internet economy to flourish and set its own terms regarding the collection of data. Initially, the FTC seemed comfortable with the self-regulatory environment.⁹⁴ Over time, however, mounting pressure from the EU and the apparent failure of self-regulation were reflected in the FTC's progress report on the industry. The FTC's 2000 report regarding the Internet and privacy asked Congress for expanded regulatory powers and even suggested a legislative proposal on Internet privacy be made to Congress.⁹⁵ Although the proposal was ultimately rejected, it remains clear that the FTC has implicitly announced the failure of self-regulation as a mechanism to balance commerce and privacy interests on the Internet.

C. A European Union Perspective on the Current Self-Regulation Approach

The current absence of data collection standards in the United States, which would afford individuals privacy, may pose a formidable threat to U.S. economic ties to our European brethren. The European Directive, a comprehensive body

for every Web site a user may visit would be costly and overly burdensome in today's environment. These high costs work against a private marketplace solution. See generally Swygert & Yanes, *supra* note 87, at 11-12.

91. Steven A. Hetcher, *The Emergence of Website Privacy Norms*, 7 MICH. TELECOMM. & TECH. L. REV. 97, 99 (2000-01). The McDonough School of Business at Georgetown University reported the results of its Internet privacy survey in March 1999. The survey found that ninety-three percent of commercial Web sites surveyed collected personal information from consumers, but only sixty-six percent of these Web Sites posted disclosures about their information gathering practices. Charles L. Kerr & Oliver Metzger, *Online Privacy: Changing Exceptions—Changing Rules*, 632 PLI/PAT 147, 156 (2001).

92. Swygert & Yanes, *supra* note 87, at 3-5.

93. Jenab, *supra* note 3, at 647.

94. Bartow, *supra* note 36, at 668.

95. *Id.* at 668; Thill, *supra* note 8, at 930.

of legislation that fiercely protects the privacy rights of the EU's citizenry, makes clear that its member states will not tolerate e-commerce exchanges with countries that could potentially undermine those rights.⁹⁶ The result of non-compliance by U.S. Internet businesses could be devastating if they are not permitted to engage in such transactions as transatlantic personal finance transactions, sale of goods, credit checks, and travel reservations.⁹⁷ The bottom line is that a staggering \$1.5 trillion of transatlantic commerce is at stake.⁹⁸

Fortunately, the United States has convinced the European Union, at least for now, to accept its proposal for a safe harbor provision.⁹⁹ The provision, reluctantly adopted by the EU, helps ensure that U.S. organizations satisfy the Directive's standards while maintaining the self-regulatory scheme that U.S. legislators currently prefer.¹⁰⁰ Under the agreement, the U.S. Department of Commerce will establish and maintain a public list of companies and other organizations that publicly declare adherence to the Safe Harbor principles.¹⁰¹ These principles basically assure other countries that the businesses on the Safe Harbor list afford protection similar to that of the Directive, without the entities' country explicitly adopting the Directive.¹⁰² The continued viability of the Safe Harbor provision will depend upon its success in protecting individual privacy to the EU's satisfaction. Thus, U.S. commerce has dodged the economic bullet for present moment.

96. Bergenson, *supra* note 42, at 1551. The Directive is a concerted effort by member states to protect privacy rights of their citizens. Basically, the Directive requires each member state to enact privacy legislation which complies with the Directive's privacy standards, maintain a national supervisory and enforcement authority, and to create a public registration system by requiring entities or individuals processing personal information to notify the member state's supervising authority, prior to any data collection. Sunosky, *supra* note 84, at 82.

97. Bergenson, *supra* note 42, at 1551-52. For a country to be approved under the Safe Harbor provision, its program must adhere to the Directive's basic principles which include:

- 1) Notice to the Web visitor of data collection practices
- 2) Ability of a visitor to choose not to partake in the data collection (an opt-out provision)
- 3) Information collected from a Safe Harbor Web site can only be transferred to a Safe Harbor third party or a contract with the same effect
- 4) Visitors have access to collected data
- 5) The visitors have a mechanism to correct inaccurate data, and the Web site business must have a dispute resolution process.

Sunosky, *supra* note 84, at 86-88.

98. *Id.*

99. *Id.* at 84-85. See also THE PRIVACY LAW SOURCEBOOK, RECENT DEVELOPMENTS: SAFE HARBOR ARRANGEMENT (EU-US) 517 (2001). A safe harbor is "a provision . . . which gives . . . protection as long as efforts were made to comply with the law." BLACK'S LAW DICTIONARY 1336 (6th ed. 1990).

100. Sunosky, *supra* note 84, at 85.

101. See THE PRIVACY LAW SOURCEBOOK, *supra* note 99, at 517.

102. Sunosky, *supra* note 84, at 85.

V. PROPOSED SOLUTIONS

A. *Adoption of the EU Directive*

One of the proposed solutions to the Internet privacy problem is the adoption of the EU Directive in the United States. Although the adoption of the EU mandate remains a plausible solution to the cyberspace data collection dilemma, it comes at a price that Congress has been hesitant to pay.¹⁰³

In addition, some real-world problems accompany the complete adoption of the EU Directive. First, the Directive contains stringent requirements for businesses to meet and for the government to enforce. These requirements may be too stringent, creating inefficiencies and overburdening e-businesses as the environment changes from under-protection to over-protection of privacy rights. It is questionable whether our personal information is worth that much. Second, although notice and knowledge are key for judicious decisionmaking by consumers and a lynch-pin in the Coasean scheme of efficient economic allocations, e-businesses may provide notice that is beyond a typical consumer's understanding or patience. For example, to avoid litigation, businesses may attempt to cover for every possible contingency with a long and complicated list of notices saturated in legal parlance. Although a business may be in technical compliance with the regulation by giving adequate notice, few Internet users will be able to read and understand the notice. This phenomenon is commonplace in today's world, as casual glance at the back of a hockey ticket, a parking garage slip, or a movie theater pass will demonstrate. Very few people read the notice on the back of a hockey ticket and requiring the notice does not change real world behavior.¹⁰⁴ In these instances, it can hardly be said that users were given knowledge in any meaningful manner.

B. *Licensing*

Some commentators suggest that personal data should be licensed.¹⁰⁵ Under this proposed solution, individuals would be given property rights in personal data. However, this solution may have a detrimental impact upon commerce by inhibiting transactions, encouraging fraud, and increasing transaction costs.¹⁰⁶ In addition, defining what information is owned by the individual or determining how to deal with information already in databases are additional complexities

103. The United States has claimed differences between the judicial systems of the United States and the EU necessitate adoption of the Safe Harbor provision rather than the EU Directive. In the United States, it is easier to bring a successful action in court than it is in European courts. Consequently, the United States' open and flexible court system coupled with moderate legislation, as opposed to comprehensive, heavy-handed legislation, will adequately protect an individual's privacy. See THE PRIVACY LAW SOURCEBOOK, *supra* note 99, at 517.

104. Walker, *supra* note 2, at 140.

105. See generally Kalinda Basho, *The Licensing of Our Personal Information: Is It A Solution to Internet Privacy?*, 88 CAL. L. REV. 1507 (2000).

106. *Id.* at 1526.

that must be resolved under such a system. Should a person's name, openly published in a phone book, really be information that a business must buy from an individual?

C. Tort Law Expansion

Another solution proposed is to expand state tort law to encompass Internet data collection practices.¹⁰⁷ This could be accomplished, for example, by expanding the "reasonable expectation of privacy" to include transactions over the Internet.¹⁰⁸ However, state regulation creates its own subset of problems in this area. Jurisdictional issues and variations in state laws will cause consumer confusion and inconsistency across cyberspace, a medium that transcends state lines.

D. Technology-based Solutions

Yet another proposed solution is rooted in technology itself. Privacy enhancing techniques (PETs), often based on pseudonyms or remailers to disguise identities of Internet users, rely on technological safeguards to protect against unwanted data collection while surfing the Web.¹⁰⁹ However, reliance upon PETs and similar techniques has shortcomings as well. Since technology is always changing, the extensive use of PETs may engage individuals and businesses in a large-scale cat and mouse game, attempting to gain advantage over the opposing side by inventing techniques that defeat the mechanisms of the other side.¹¹⁰ Additional burdens may also be placed upon the technology to adapt to new Internet methods and access channels, such as cellular telephones. Buying the initial requisite hardware and software and constantly updating for technological advancements involves costs for both businesses and individuals. Also, keeping apprised of the upgrades needed to protect their personal information may be onerous for individuals. Lastly, PET's would not increase

107. See, e.g., Zimmerman, *supra* note 13, at 458.

108. *Id.*

109. See Helms, *supra* note 5. Generally, remailers create anonymity for the user by masking or replacing domain names or other identifying information attached to e-mails. For example, remailer technology would change the address "johnsmith@aol.com" to "az3234@remailer.com." Proxy surfing allows a user to surf the Internet through another's server. This server acts as a substitute TCP/IP address, which will be displayed as the user's address to Web sites collecting the data. Thus, the user's true address is cloaked from the prying eyes of the Internet. For an expanded discussion on PETs, see *id.*

110. For example, Intel was contemplating the use of a controversial user identification number embedded within its then upcoming processor chip. However, in April 1999, the company, in the wake of boycotts and denouncements from political leaders (due to the number's ability to decimate privacy), decided against including the identification number feature in its new chip. Declan McCullagh, *Intel Nixes Chip-Tracking ID*, WIRED NEWS, Apr. 27, 2000, at <http://www.wired.com/news/politics/0,1283,35950,00.html>.

a user's knowledge of what and how information is collected and used.¹¹¹ Without that knowledge, users will be ill-equipped to decide to whom they wish to give information.

E. Seals

Another proposal to solve the Internet privacy dilemma harnesses optional seals to identify Web sites that adhere to the seal provider's privacy principles.¹¹² "The most notable examples of such initiatives are TRUSTe, Better Business Bureau Online, and SecureAssure."¹¹³ Participating Web businesses donning a seal assure the site's visitors that the site's privacy policy and practices conform to the privacy policy standards outlined by the seal-sponsoring organization.¹¹⁴ For example, the privacy policy of the Better Business Bureau's Privacy Program includes "verification, monitoring and review, consumer dispute resolution, a compliance seal, enforcement mechanisms and an educational component."¹¹⁵ A 1998 poll indicated that twenty-eight percent of respondents who would have originally not provided personal information in order to receive free pamphlets or coupons would be more likely to provide information to a Web site if the site had a privacy policy, and fifty-eight percent said they would be more likely to provide personal information if the site contained both a privacy policy and a seal issued from a reputable organization such as the Better Business Bureau.¹¹⁶ Seal programs also seem to pass EU muster, because the programs' privacy policies meet the rigorous demands of the Directive.¹¹⁷

111. As one article noted: "Privacy isn't just about fancy software. It's also about making sure that information is being used in the ways companies had promised. Technology won't protect people from privacy invasions. Only people do that." Green et al., *supra* note 10.

112. Hayward, *supra* note 63, at 232-33.

113. *Id.*

114. *Id.*

115. COUNCIL OF BETTER BUSINESS BUREAU, INC., ABOUT THE PRIVACY PROGRAM, at <http://www.bbbonline.org/business/privacy/index.html> (last visited Oct. 10, 2002).

116. See generally Lorrie Faith Cranor et al., *Beyond Concern: Understanding Net Users' Attitudes About Online Privacy* (Apr. 14, 1999) at <http://www.research.att.com/resources/trs/TRs/99/99.4/99.4.3/report.html>.

117. Shimanek, *supra* note 11, at 468. For example, Principle III of the BBBOnline Code of Online Business Practices suggests that Web sites and online advertisers bearing their privacy seal should:

[P]ost and adhere to a privacy policy that is open, transparent, and meets generally accepted fair information principles including providing notice to what personal information the online advertiser collects, uses, and discloses; what choices customers have with regard to the business' collection, use and, disclosure of that information; what access customers have to the information; what security measures are taken to protect the information, and what enforcement and redress mechanisms are in place to remedy any violations of the policy. The privacy policy should be easy to find and understand and be available prior to or at the time the customer provides any personally

Unfortunately, voluntary seal programs have faltered as a feasible solution to the privacy issue for several reasons. First, the programs are completely voluntary, thus severely limiting the number of Web sites that fall under the purview of a seal program.¹¹⁸ Also, in many cases, a seal program's sponsors, who established and fund the seal program, are also seal program participants.¹¹⁹ In addition, although the seal programs boast of enforcement mechanisms, the only real penalty that the seal issuer can assess against a violator is the revocation of the seal.¹²⁰ Lastly, it is difficult to uncover seal participants who violate the privacy policies of a program, which further undermines the effectiveness of the seal programs.¹²¹

VI. A NEW PROPOSAL

Current seal programs are voluntarily joined, seldomly monitored, and lax in enforcement for non-compliance.¹²² However, the underlying concept of seals

identifiable information.

COUNCIL OF BETTER BUSINESS BUREAU INC., CODE OF ONLINE BUSINESS PRACTICES FINAL VERSION WORKS, at <http://www.bbbonline.org/Reliability/Code/principle3.asp> (last visited Nov. 10, 2002). Although the European Union publicly declared these seal programs were acceptable when the Web sites complied with the policies of seal providers, it also noted that the discretionary nature of the programs were not adequate to protect privacy interests. Shimanek, *supra* note 11, at 468.

118. See generally COUNCIL OF BETTER BUSINESS BUREAU, INC., *supra* note 115.

119. Hayward, *supra* note 63, at 233. Jason Catlett, President of Junkbusters, notes that a seal program's non-profit status is of no import to ensuring privacy and compliance, stating that "[t]he nonprofits are essentially industry-funded PR and lobbying efforts, and they're up front about the fact that their main aim is to stave off legislation." THE INDUSTRY STANDARD: PRIVACY? WHAT'S THAT?, at <http://www.thestandard.com/article/display/0,1151,17385,00.html> [hereinafter THE INDUSTRY STANDARD] (last visited Nov. 10, 2002).

120. Hayward, *supra* note 63, at 233-35.

121. See generally *id.* A survey conducted by AT&T Labs in November 1998 revealed that "[a] joint program of privacy policies and privacy seals seemingly provides a comparable level of user confidence as that provided by privacy laws." The following responses were given by users who were unsure or would not give personal information (such as name and address) to a Web site in order to receive free pamphlets and coupons on hobbies of interest to the user:

- 1) 48% said they would be more likely to provide it if there was a law that prevented the site from using the information for any purpose other than processing the request.
- 2) 28% said they would be more likely to provide it if the site had a privacy policy.
- 3) 58% said they would be more likely to provide it if the site had both a privacy policy and a seal of approval from a well-known organization such as the Better Business Bureau or the AAA.

Cranor et al., *supra* note 116.

122. Zimmerman, *supra* note 13, at 457. In a recent investigation, Interhack, a security and privacy firm, discovered four retailers who, contrary to their privacy policies, shared names, addresses, and other information collected at their sites with a third party marketing company

appears to be a reasonable way of notifying Web visitors of the site's particular collection practices. A modified "seal-type" program may resoundingly answer the cyberspace privacy issue, creating an amendable solution for both e-business and user privacy interests. However, merely codifying an existing seal program is not enough; a new seal-type program must also address the other deficiencies entrenched in current seal programs.¹²³

The following is a suggested privacy program for all e-business Web sites. Although the discussion is not exhaustive of the expansive detail necessary to implement such a program, the features listed are the substantive elements of a federal program designed to protect privacy at a market-efficient level.

A. The "Privacy Toolbar"

The nucleus of the proposed privacy program is a graphical user interface¹²⁴ coined the "privacy toolbar." This toolbar would be similar in appearance to the visual toolbars of many software applications and operate in a similar fashion. The toolbar would comprise a series of buttons, each containing a picture icon and representing a "core element" of a privacy policy. Thus, the particular buttons that appear on a Web site's privacy toolbar would depend on its treatment of an individual's information. However, every toolbar would derive from the same pool of icons, furthering uniformity and reliability while allowing each toolbar to be custom-fit to the site's data collection practices.¹²⁵ The toolbars should also have the same basic construction and be placed in a conspicuous location on the site. Furthermore, the icons should be readily apparent and internationally recognizable, in a similar manner to road signs, and serve the same purpose: imparting information about what lies ahead for the person who utilizes the Web site. As a result, these iconic buttons would serve as visual management guides to an individual visiting a particular Web site.

To be a useful reference for users, however, the toolbar should contain a limited number of buttons.¹²⁶ Although the way in which information is collected and used appears limitless, rational categories could be generated to serve as

named Coremetrics. Additionally, two of the four retailers carried the TRUSTe seal, that supposedly indicates the site is committed to the practice of fair information collection practices. See THE INDUSTRY STANDARD, *supra* note 119.

123. See Hayward, *supra* note 63, at 233-35.

124. A graphical user interface is a means of operating a computer by manipulating picture icons and windows with the use of a mouse. CHARLES E. PUFFENBARGER, DICTIONARY OF COMPUTER TERMS (1993).

125. Conversely, under the guise of current seal programs, the same seal can represent differing privacy practices. It would be very difficult to capture the core elements of a site's privacy policy with only one common symbol. The privacy toolbar would use "mass customization" to tailor the toolbar around specific information collection practices, thereby imparting more information than a single seal.

126. If too many buttons are used, the toolbar may become self-defeating, complicating the message to such an extent that it is subsequently disregarded by a large number of users.

definitive guideposts for Web surfers.¹²⁷ These categories should revolve around fundamental privacy dimensions: what information is collected/used and how it is collected/used.¹²⁸ To disclose what types of data are collected, for example, a button may display a medical cross for medical information. To convey how the information is used, for example, a toolbar may contain a button depicting two persons facing each another to indicate that the site distributes the information it collects to third parties. Another button may display a safety pin, indicating that the site has data security measures in place to protect the data during transfers. Still another site's toolbar may contain a button with a checkmark, indicating that the site allows users to review the data that has been collected about them and make corrections to that data. Ultimately, the buttons on any particular toolbar would change commensurate with the particular Web site's information collection practices.

Of course, the categorization of privacy practices will likely spur the stiffest of challenges. If categories are defined too narrowly, consumer confusion will result from the countless categorizations. Alternatively, if categories are defined too broadly, consumer confusion will ensue as to what a particular site's collection practices really entail. In addition, broad categorizations will inhibit smaller, more innocuous information gatherings on Web sites if they are grouped in the same category as sites that commit greater intrusions into personal privacy.

The privacy toolbar is designed to compress a complex privacy policy into simple icons in order to facilitate a user's understanding of a site's privacy policy. By design, the toolbar should not supplant the posting of a privacy policy in full text. In fact, the toolbar may encourage Web sites to remove layers of complexity that cloak their current privacy policies and create easy-to-read, consumer-friendly textual privacy policies that clearly and fully explains their information collection practices.

Educating the Internet public regarding the meaning of the buttons located on the toolbar may require a formal program that utilizes various media. Thus, successful implementation of the program may require governmental spending to help educate the e-community about the toolbar program, its purpose, and its limitations.¹²⁹ In addition to a formal campaign to impart general learning, the toolbar itself should be an indispensable tool for informal self-education. Each button on the toolbar, therefore, should be a functional button. When depressed ("clicked"), the button should link the user to a site that explains the element in

127. One possible method of categorizing "core elements" may be via the FCC's Fair Information Practices Principles (FIPPs). The five FIPPs are (1) Notice/Awareness; (2) Choice/Consent; (3) Access/Participation; (4) Integrity/Security; and (5) Enforcement/Redress. Steven Hetcher, *The FTC as Internet Privacy Norm Entrepreneur*, 53 VAND. L. REV. 2041, 2049 (2000). Each element or subelement of the FIPPs could be represented by an icon in a button on the privacy toolbar and would be precisely and unambiguously defined.

128. See Green et al., *supra* note 10.

129. "[W]hen we asked respondents about online privacy seal programs *without mentioning any specific brand names*, their responses suggest that they do not yet understand how Internet seal programs work." Cranor et al., *supra* note 116.

detail as it pertains to the site and any steps the user may need to take to effectuate that element. In addition, all toolbars would include a help button, which would link to an FTC Web page not only describing in detail the general mechanics and definitions of the toolbar program, but also a place to report suspected violators of the program. Considering the power of the Internet and user familiarity with toolbars, the self-education program may yield successful results without pursuing secondary educational avenues.

B. Notice Before Data Collection

To effectively protect privacy and yet permit businesses to collect information at the first possible moment, the toolbar should be displayed on the Web site's page prior to collecting data. Three alternatives are available to Web sites under this requirement. One possibility is that a Web site will display only a home page privacy toolbar, which will be the uppermost boundary for data collection for other pages associated with that home page. However, this alternative may be susceptible to circumvention of notice if links are used to bypass a Web site's home page. However, a program code may be able to adequately address the issue by first determining from what site the user came, and then posting a dialog box displaying the toolbar for that particular page.¹³⁰

Web sites must also reflect the collection practices of advertisement banners placed on their Web pages. Either the Web site's home page becomes the privacy limit for banners placed on their pages, or the banners themselves must feature a privacy toolbar. Although the process may seem cumbersome at first, the inconvenience should be no more than that posed by current pop-up windows or dialog boxes today.¹³¹

Alternatively, if different collection practices exist within a Web site, or home page toolbars prove ineffective, then each page must be affixed with a toolbar commensurate with the collection practices of that page. Of course, each page must conform to the toolbar buttons it posts or risk violating the program. This strategy is helpful if the Web site is highly complex, or the Web site wants to show the content of part of its site to entice users to agree to their information collection practices on subsequent pages. Again, the site that has a different collection practice must reflect that practice with an appropriately marked toolbar, and the user must affirmatively "click" past the toolbar before the site starts collecting data at that level.

Finally, if the Web site wishes to collect data when the user accesses the site, then the site must provide the toolbar in a pop-up dialog box prior to entry to the Web site. This would be tantamount to dialog boxes indicating that the individual is leaving a secured site and moving to an unsecured site, and then

130. Of course, the information noting from where the user came could be used, but could not be permanently collected unless the user agreed to its collection through the dialog box.

131. Considering the number of people that are concerned about privacy, this should not be an issue. In addition, browsers may be set to allow pages that meet certain privacy conditions to pass through seamlessly without clicking a dialog box every time.

requiring the individual to affirmatively respond by clicking either the "Yes" or "No" button.

Regardless of the approach allowed, the rationale is clear: sites must not collect data prior to the posting of the privacy toolbar, thereby providing, at a minimum, constructive notice of their privacy practices to Web users.¹³² Concurrent or post-collection notification frustrates the efficient market valuation of privacy by individuals accessing the site. Individuals must be allowed to determine whether they wish to surrender their privacy before it is actually relinquished. The market must make that value determination.

C. ISP Requirements

Although privacy toolbars end unauthorized Web site data collection methods, ISPs still hold the dangerous "clickstream" surveillance potential.¹³³ Since the problem lies upstream from Web sites, the issue must be appropriately addressed or risk eviscerating the efficacy of the proposed privacy program. However, the notice rationale used for Web sites and ad banners can be applied to ISPs as well. Hence, ISPs must conspicuously post privacy toolbars (or the icons themselves) in their on-line and off-line subscription agreements, using the same toolbar protocol as posted on Web sites.¹³⁴ This approach would possibly allow the customer to choose between his or her privacy rights and lower subscription rates, since ISPs may charge higher rates to compensate for the lost revenues associated with the collection, use, and sale of information.¹³⁵

132. This system, however, may be tantamount to a formal opt-in mechanism, and may run afoul of a First Amendment Constitutional challenge. *See supra* note 67 and accompanying text.

133. Helms, *supra* note 5, at 297; Kang, *supra* note 49, at 1224. Prior to the merger of America Online (an ISP) and Time Warner in January 2001, Jerry Berman, Executive Director of the Center for Democracy & Technology, and John Morris, Director of the Broadband Access Project, commented:

The proposed merger of AOL and Time Warner does highlight both the increased risks for privacy problems as the Internet evolves, and the great potential for self-regulatory efforts to enhance privacy protection. Both AOL and Time Warner have access to significant amounts of personal data about their subscribers. For AOL, this includes for example, information about online service subscribers, AOL.COM portal users, and ICQ and instant messaging users. Time Warner has access to information about ranging from cable subscriber usage to magazine subscriptions. The specter of the merged companies pooling all of their information resources, and then mining those resources for marketing and other purposes, should be cause for concern.

Jerry Berman & John Morris, Prepared Statement Before the Senate Committee on Commerce, Science, and Transportation Subcommittee on Communications (Mar. 2, 2000), at <http://www.cdt.org/testimony/000302berman.shtml>.

134. Although occupying different hierarchical levels in cyberspace, privacy issues challenging Web sites are also present with ISPs.

135. *See generally* Youngblood, *supra* note 80; Shimanek, *supra* note 11. List vending, which is the process of compiling and selling information gathered on individuals to other companies, is

However, the leverage of ISPs versus consumers may be too great, and therefore no ISP of any size would offer the choice of additional privacy.¹³⁶

However, under the privacy toolbar program, ISPs could recover lost revenues from foregoing information collection by offering scaled subscription rates. Under Coasean theory, a consumer that values his or her privacy beyond what the right costs would “buy” the right to keep his or her information private. Hence, ISPs could offer either hierarchical levels of privacy protection at scaled subscription rates¹³⁷ or charge a higher rate for access to all subscribers, provided the ISPs do not unfairly charge for elevated levels of privacy to dissuade people from choosing more privacy.¹³⁸ If an ISP receives higher subscription rates to compensate for the lack of personal information to sell or use, the ISP’s revenue stream will be equivalent, and thus the ISP has no incentive to favor one choice over the other.

D. Mandated Participation

Under a statutory toolbar program, all U.S. businesses would be required to attain certified toolbars for their Web sites reflective of their data collection practices.¹³⁹ Each Web site would be issued a specific toolbar, custom-fit to its privacy practices, and this information, including current collection and use of information, would be recorded in a national registry.¹⁴⁰ This registry would be

big business. The Direct Marketing Association reports that over fifty percent of direct marketers use the Internet, and forty-eight percent actively mine the membership rosters of online services providers for data on individuals. Safier, *supra* note 39, at 63.

136. ISPs link users and the Internet, and this leverage may inhibit the market from achieving Coasean irrelevance. As such, legislation may be needed to intervene and enact stronger laws in support of privacy. However, as the number of ISPs increase, this risk decreases.

137. This approach provides the clearest notice to a customer about privacy practices because he or she affirmatively chooses the level of privacy in which he or she feels comfortable operating. Thus, the consumer truly chooses the value of his or her privacy in each instance. This approach can be analogized to the “shopper’s cards” issued by some grocers. The grocers, in exchange for data collection on consumer purchases, give price discounts to those who use the cards. If privacy is paramount, the same goods are available to the shopper who chooses not to use a card, albeit at higher prices. *See, e.g.,* Consumers Against Supermarket Privacy and Numbering, Kroger: What Savings?, CASPIAN Shoppers Discuss Kroger “Card Savings,” at <http://www.nocards.org/savings/savingsletterskroger.shtml> (last visited Nov. 11, 2002).

138. If necessary, the government could require a complete sealing of an ISP’s records of an individual’s transactions, allowing disclosure only upon a court order. This requirement, however, is more intrusive than the first alternative and only should be used as a secondary alternative if ISPs fail to allow individuals greater privacy protections in any meaningful sense.

139. Jason Catlett, Corporate President of Junkbusters, a New Jersey privacy protection Web site, commented that privacy seals would be more effective when coupled with strong Federal online privacy laws. *See* Catlett, *supra* note 26.

140. This provision parallels the current practice of voluntary seal programs and the registry kept by the Department of Commerce as set forth in the Safe Harbor agreement with the EU. *See*

used as a reference and an enforcement mechanism. If a Web site's data collection practices fail to conform to the policy as registered with the government, the site will be in violation of the program and subject to penalty. Without legally mandating participation and enforcing the program for Internet privacy, consumer trust in e-commerce will continue to wane.¹⁴¹

Also, under current seal programs and the European Directive's Safe Harbor provision for the U.S., businesses are required to conform to a set of privacy principles. A privacy toolbar program would be more amenable to businesses, because it would not interfere with their current business models or collection practices. The toolbar program only requires that e-businesses offer simple and true representations of their information collection practices.¹⁴² It will be business as usual for e-businesses under the privacy toolbar program, albeit with an additional notice requirement.

E. FTC Regulated and Enforced

Congress should designate the responsibility of the toolbar program and its enforcement to the FTC. If buttressed with the appropriate legislation, enforcement is best left to the current governmental experts in the field of cyberspace. The FTC currently monitors privacy issues on the Internet and could make any necessary recommendations to Congress, or be given authority to set administrative rules to help assist with efficient execution of the toolbar program and enforcement process.¹⁴³ However, considering the ever-expanding juggernaut of e-privacy, more governmental resources will be essential to effectively tackle enforcement procedures. These resources will need to provide for random audits, complaint investigation, and the administrative duties that will accompany a toolbar program.

Another key element of the statutory regulations is enforcement.¹⁴⁴ To be an effective deterrent against violating the program, the program requires an FTC penalty that, multiplied by the probability of getting caught and found guilty, outweighs the value of the illegal activity.¹⁴⁵ In many instances, the chances of

discussion *supra* note 99 and accompanying text; *see also* THE PRIVACY LAW SOURCEBOOK, *supra* note 99, at 517.

141. Shen, *supra* note 21, at 19. An October 1998 study revealed that over seventy-two percent of Americans feel that new laws to protect privacy on the Internet should be enacted. Gvu's 10th WWW User Surveys, at http://www.cc.gatech.edu/gvu/user_surveys/survey-1998-10/graphs/privacy/q59.htm (last visited Nov. 11, 2002).

142. The EU Directive mandates that its members follow strict privacy guidelines set forth by the EU. *See* discussion *supra* note 96.

143. *See generally* Hetcher, *supra* note 91.

144. Research conducted by Forrester Research found that ninety percent of Web sites fail to comply with basic privacy principles. Basho, *supra* note 105, at 1522.

145. The usual remedy for violators of the FTC Act is injunctive relief. If the injunction is subsequently breached, then the FTC can impose harsher terms. However, if a company posts a privacy policy and collects information contrary to that policy, then the FTC can impose sanctions

getting caught undertaking unlawful collection practices may be minimal because an individual would not readily discover covert collection practices by culpable businesses. Thus, the penalty for unlawful data collection practices must be high enough to account for the smaller probability of getting caught.

VII. BENEFITS OF THE NEW PRIVACY PROGRAM

A. *Least Intrusive Legal Alternative*

Privacy toolbars impart information and allow market forces to determine the value of privacy rights versus the commercial value of information collection and use.¹⁴⁶ Consumers, without having to “opt-in” or “opt-out” of complex privacy notices, can use privacy toolbars as easy visual management devices, discreetly leaving sites without complex negotiations regarding information collection and use.¹⁴⁷ This process allows capitalistic forces to operate, yet does not force excessive burdens upon the site to contract with Web site visitors, construct complex legal notices, develop mandated “opt-in” or “opt-out” devices, or develop other methods and mechanisms. Rather, the business can continue to use its current methods of collection, but must affix a notification of its conduct conspicuously on the Web site. Again, market forces, not the legislature, will be the ultimate arbiters of the correct balance between privacy and business needs. Legislation should merely serve as a facilitating device.

In addition, the privacy toolbar program is less likely than more comprehensive legislation to impinge upon a business’s right to commercial free speech. The toolbars give notice to prospective Web site visitors of information collection practices, but do not inhibit current collection practices. What will ultimately dictate the level of privacy required is the market’s acceptance of more invasive data collection practices in exchange for the value proposition of a particular site.¹⁴⁸

for deceptive practices, including statutory damages, attorney’s fees, and economic remuneration. Interview with James Nehf, Professor, Indiana University School of Law—Indianapolis (Jan. 20, 2002).

146. As one commentator noted, “when a ‘new’ problem is identified in cyberspace, we should initially respond with the lowest, most decentralized level of control possible.” Trotter Hardy, *The Proper Legal Regime for “Cyberspace,”* 55 U. PITT. L. REV. 993, 1026 (Summer 1994). He suggests, and this author agrees, starting with the presumption that the lowest level of controls can adequately resolve the problem, and if not, then ascend the ladder of centralized control until satisfactory results manifest. *Id.* Since self-regulation has not proven successful enough to ensure real privacy protections, we must move up the “control” ladder.

147. Many “opt-out” provisions are not clearly displayed on Web sites, thereby providing individuals little meaningful control over their information. Users must delve into the complexities of the “opt-out” provision to determine their rights, and many are unwilling or unable to do so. This is important, because in “opt-out” provisions the user’s information will be collected and used unless the individual takes affirmative steps to be excluded from the site’s database. Shen, *supra* note 21, at 27.

148. The same conceptual framework can be applied to ISPs and ad banners as well.

B. Uniformity, Clarity, and Reliability

Under a mandatory privacy toolbar program, all sites would adhere to the same iconic system, and thus consumers would have a clearer expectation of the level of privacy offered at every e-business site. Uniform system metrics will not relegate the consumer to sifting through the mire of inconsistent policies and notices.¹⁴⁹ A button on the privacy toolbar will stand for the same core element on one site as it does another, thereby clearly defining and communicating each element uniformly and consistently across the entire Internet. As a result, Web users can rely upon these toolbar icons to understand what the collection practices of a particular Web site entail. Once consumers learn the meanings of the toolbar buttons, they can grasp the basic practices of any U.S.-based Web site. In addition, icon-type programs have already been applied with some success in the market.¹⁵⁰ Market learning has already been accomplished to some extent, and existing technology can support a mandatory toolbar program in the electronic arena.

C. Ease of Use

The toolbar signifies a readily available store of further information regarding privacy, including definitions of buttons, definitions of terms, and details regarding the site's specific practices. The consumer need not locate hard-to-find privacy policies buried deep within a Web site's numerous pages. In addition to its visibility, the most novice of Internet consumers can also understand the toolbars affixed to Web sites, as opposed to potentially drowning in the legalese and complexities of formal notice disclosures, "opt-ins," or "opt-outs."¹⁵¹ As a result, many of the barriers that cause people not to "opt-out" will be removed, as they can discreetly and nonchalantly exit the site without

149. Seal programs were intended to, and have succeeded to a certain extent, establish more comprehensive and uniform methods of Internet data collection practices. See Hayward, *supra* note 63, at 232-33. However, sites that display the same privacy seal may provide Internet visitors with widely divergent information collection practices. *Id.* at 235.

150. According to a 2001 Greenfield Online Survey, almost ninety percent of online shoppers would feel more confident shopping on a site that displays BBBOnline's privacy seal. Council of Better Business Bureau, Inc., BBB Online, at http://www.bbbonline.org/privacy/priv_EN.asp (last visited Nov. 11, 2002).

151. See Walker, *supra* note 2, at 140. BBBOnline notes that "displaying the BBBOnline seal assures customers with just one glance" that the requisite privacy practices are in place. Council of Better Business Bureaus, Inc., *supra* note 150. Today, when a Web site posts a privacy policy, it is usually "vague, legalistic, and provides little useful information." Mary J. Culnan, *The Georgetown Internet Privacy Policy Survey: Report to the Federal Trade Commission*, at <http://www.msb.edu/faculty/culnanm/GIPPS/gipps1.PDF> (last visited Dec. 15, 2001). Over sixty-five percent of Americans felt that security metrics that rated the security of a Web site would prove useful to consumers. GVU's 10th WWW User Surveys, *supra* note 141.

worry.¹⁵² In addition, browsers could be programmed to identify and authorize threshold toolbar grades, allowing access to only those Web sites that have a collection of buttons meeting standards determined by the user.¹⁵³

D. Equity Across Market Players

Smaller players who may have difficulty in complying with a complex statutory scheme may be placed at a disadvantage to larger, more capitalized Web players. However, a simple privacy toolbar program is affordable to all businesses because it does not require extensive changes to a business's collection techniques or require individual contracts with Internet visitors.

E. Satisfaction of EU Directive Requirements

The privacy toolbar program will afford EU consumers the same or heightened protection level as the Safe Harbor provision under which companies currently operate. The EU could require that certain core elements exist before the Web site may conduct business with the EU. In addition, all Web sites and operators would be under legislative edict to post toolbars, whereas today the Safe Harbor provision is purely voluntarily.¹⁵⁴ Conducting business with U.S.-based sites would become easier, as a quick online visit to the Web site will reveal the broad policies regarding collection activities of businesses.

Of course, any regulation of a previously unregulated industry can cause adverse economic repercussions. However, the toolbar program is a relatively unobtrusive means of formalized governmental regulation. In addition, economic growth must be balanced with the competing value of individual privacy to attain a solution that maximizes the collective social good.

CONCLUSION

The Internet economy is a new frontier for business growth and expansion. However, privacy issues must be resolved in order for the e-economy to realize its true potential as an economic medium. Technology will continue to develop and change the dynamics of the Internet architecture, but personal privacy concerns will remain throughout technological evolution. Self-regulation is currently failing to adequately meet the expectations of online consumers, and as such, may be pulling back the reins of e-commerce growth. Regulation of personal data is an integral part of operating in the Internet environment, and current laws cannot adequately cope with the current deficiencies in consumer privacy protection. Although new regulations are required, they should be

152. See generally Sovern, *supra* note 37, at 1071-78.

153. This would be similar to Web browsers that can currently be programmed to reject "cookie" files.

154. A posted toolbar does not automatically guarantee that the Directive's requirements have been met. However, the EU will have more assurance that the site is compliant with the policy because stiffer penalties for noncompliance would exist for violators.

drafted to minimally disrupt the current practices of businesses and refrain from impinging upon free commercial speech. A mandatory privacy toolbar program accomplishes both tasks and allows the invisible hand of the market to truly place an accurate value on personal data privacy. As such, the market will attain the efficiencies desired, and e-business will continue to thrive on the market's terms.

A HOT DEBATE IN THE SUMMER OF 2001: *STATE V. OAKLEY*'S EXCESSIVE INTRUSION ON PROCREATIVE RIGHTS

KATHERINE E. MCCANNA*

INTRODUCTION

David Oakley is the father of nine children. His failure to pay child support for his nine children has led to arrears in excess of \$25,000. Faced with this violator of Wisconsin Statute section 948.22(2)¹ (which makes neglect of child support payments for over 120 days a felony in Wisconsin), circuit court Judge Fred Hazlewood crafted an unusual punishment for Oakley.² Judge Hazlewood knew that Oakley would be of no financial assistance to his children from a prison-cell, and so he chose to suspend Oakley's eleven-year prison sentence, imposing instead a five-year probationary period. Among the terms of Oakley's probation, Judge Hazlewood included a prohibition of Oakley's right to procreate until he demonstrated an ability to support his present and possible future children.³ This prohibition led to a Wisconsin Supreme Court appeal⁴ and one of the most controversial decisions of the summer of 2001.⁵ The supreme court majority upheld the lower court's questionable probation term, amidst voices of apprehension in the two concurrences and two dissents.⁶

* J.D. Candidate, 2003, Indiana University School of Law—Indianapolis; B.A., 2000, Hanover College, Hanover, Indiana.

1. WIS. STAT. § 948.22(2) (1997-98).

2. *State v. Oakley*, 629 N.W.2d 200, 202-03 (Wis. 2001), *cert. denied*, 123 S. Ct. 74 (2002).

3. *Id.* at 203.

4. *Id.*

5. Journalists and other concerned individuals spanning the globe expressed opinions concerning the heated debate over procreative rights in *Oakley*. Glenda Cooper, a staff writer for the WASHINGTON POST, stated, "The decision . . . has sparked a national furor, with legal experts warning that the case opens a potential Pandora's box: giving the state the power to decide who has the right to have children—based on their financial position." Glenda Cooper, *Wisconsin Deadbeat Dad Case Tests the Rights to Parenthood; Ruling Sets Conditions on Having More Children, Stirs Debate*, WASH. POST, July 15, 2001, at A02.

In an interview with a reporter for National Public Radio, Wisconsin reporter Dennis Chaptman opined that the controversy in *Oakley* was far from over: "[Oakley's attorneys] have hinted very broadly that they will appeal to the Supreme Court. And this seems a very likely case to go up and get reviewed by the justices." Interview by Lisa Simeone with Dennis Chaptman, reporter, MILWAUKEE J. SENTINEL, *Weekend All Things Considered* (NPR radio broadcast, July 14, 2001). Oakley's attorneys did, in fact, seek review by the U.S. Supreme Court; however, their petition for certiorari was denied on October 7, 2002. 123 S. Ct. 74 (2002).

6. Justice Jonathan Wilcox authored the one-man majority opinion, while Justices William Bablitch and N. Patrick Crooks both filed concurring opinions. The three women justices, Chief Justice Shirley S. Abrahamson, and Justices Diane Sykes and Ann Walsh Bradley, dissented. *Oakley*, 629 N.W.2d at 200.

In Indiana, a similar issue was before the Indiana Court of Appeals in *Trammell v. State*.⁷ Kristie Trammell was a mother who had been convicted of child neglect on two separate occasions, one of which resulted from neglect so severe that Trammell's helpless infant died of malnutrition. She appealed the trial court's order that she be precluded from becoming pregnant again as a term of her probation. The Indiana Court of Appeals, in a case of first impression,⁸ struck down this procreative restriction, holding that such an impingement of Trammell's right of procreation was excessive, as it served no rehabilitative purpose.⁹

The conflicting outcomes of these two summer 2001 opinions illustrate a sharp division among state courts in the treatment of probationers and attempts to more creatively and effectively deal with criminals. Despite the sympathetic listener's shock and dismay at a father who would bring nine children into the world and then refuse to financially support them, or at a mother who so severely neglects her dependent infant that the infant dies of malnutrition and dehydration, prohibiting these criminals from procreating is not the answer. This Note explores the reasons why the Wisconsin Supreme Court went too far when it upheld such a probation term and will offer alternative means of achieving the judiciary's goal of upholding the rights of individuals while rehabilitating criminals by imposing useful and creative probation sentences.

Before delving into a deep analysis of the problems and solutions associated with the prohibition of procreation as a probationary term, the decision in *State v. Oakley* will be placed in context in order to illustrate why it is a landmark case. Thus, Part I of this Note surveys past cases in which conditions prohibiting procreation have been upheld and explain how David Oakley differs from the defendants in those cases. Part II addresses the nature and theories behind imposition of probation for criminals and the standards appellate courts employ in reviewing probation conditions, generally. Analysis of the standard of review employed for probation conditions that impinge upon fundamental constitutional rights will be reserved for Part III, which begins by exploring the constitutional aspect of the right to procreate. In Part IV, I tie together the standards of review laid out by the probation discussion of Part II and the constitution discussion of Part III, thus offering and applying my test of choice for probation conditions that impinge upon constitutional rights. Part V explores the practical side of the

The decision's split along gender lines did not go unnoticed by observers of the case. A Salt Lake City, Utah, journalist noted: "What makes the Wisconsin ruling especially interesting is the seven state supreme court justices split along gender lines, with the four men voting to penalize the deadbeat dad. The three women justices dissented. Imagine deserting 'the sisterhood' like that." Bonnie Erbe, *Deadbeat-dad Split Surprising*, THE DESERET NEWS (Salt Lake City, UT), July 31, 2001, at A12. Erbe went on to hypothesize that the women's apparent sympathies for Oakley's civil liberties could be linked to abortion issues: "Perhaps [the women justices] fear that once the government starts messing with bedroom issues, abortion rights will be out the window." *Id.*

7. 751 N.E.2d 283 (Ind. Ct. App. 2001).

8. *Id.* at 288.

9. *Id.* at 289.

Oakley debate, covering the two main problems of practical enforceability and inconsistency with public policy. Finally, Part VI addresses alternative means of dealing with defendants like *Oakley* and other deadbeat parents.

I. *STATE V. OAKLEY'S* PROHIBITION OF PROCREATION:
AN OLD CONDITION FOR A NEW DEFENDANT

Restrictions on procreative rights as probation conditions and sanctions for criminal behavior are not new concepts. Numerous cases and articles concerning the restriction of procreative rights of mentally incompetent individuals,¹⁰ prisoners,¹¹ sex-offenders,¹² child-abusers,¹³ and others¹⁴ have filled the legal landscape since the ability to prevent conception came about. While the idea of limiting procreative rights is not a new one, the extreme limitations permitted in the landmark case of *State v. Oakley* were unprecedented.¹⁵ *Oakley* stands apart from its predecessors because it limits the procreative rights of an entirely new set of defendants: *Oakley*, a convicted "deadbeat dad," stands apart from convicted child-abusers, convicted sex-offenders, mental incompetents, and prisoners in several respects.¹⁶

10. Justice Oliver Wendell Holmes, in the Supreme Court case *Buck v. Bell*, stated, "[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind Three generations of imbeciles are enough." 274 U.S. 200, 207 (1927).

11. See *Gerber v. Hickman*, 291 F.3d 617 (9th Cir. 2002); *Hernandez v. Coughlin*, 18 F.3d 133 (2d Cir. 1994); *Goodwin v. Turner*, 908 F.2d 1395 (8th Cir. 1990); *Percy v. State*, 651 A.2d 1044 (N.J. Super. Ct. App. Div. 1995); Jacqueline B. DeOliveira, *Marriage, Procreation and the Prisoner: Should Reproductive Alternatives Survive During Incarceration?*, 5 *TOURO L. REV.* 189 (1988); Stephen S. Sypherd & Gary M. Ronan, *Substantive Rights Retained by Prisoners*, 89 *GEO. L.J.* 1897 (2001).

12. See *People v. Gauntlett*, 352 N.W.2d 310 (Mich. Ct. App. 1984); Carol L. Kunz, *Toward Dispassionate, Effective Control of Sexual Offenders*, 47 *AM. U. L. REV.* 453 (1997).

13. See *People v. Pointer*, 199 Cal. Rptr. 357 (Ct. App. 1984); *Howland v. State*, 420 So. 2d 918 (Fla. Dist. Ct. App. 1982); *Rodriguez v. State*, 378 So. 2d 7 (Fla. Dist. Ct. App. 1979); *State v. Mosburg*, 768 P.2d 313 (Kan. Ct. App. 1989); *State v. Livingston*, 372 N.E.2d 1335 (Ohio Ct. App. 1976); Stacey L. Arthur, *The Norplant Prescription: Birth Control, Woman Control, or Crime Control?*, 40 *UCLA L. REV.* 1 (1992).

14. See *People v. Dominguez*, 64 Cal. Rptr. 290 (Ct. App. 1967) (defendant was convicted of second degree robbery); *Thomas v. State*, 519 So. 2d 1113 (Fla. Dist. Ct. App. 1988) (defendant was convicted of grand theft and battery); *Wiggins v. State*, 386 So. 2d 46 (Fla. Dist. Ct. App. 1980) (defendants were convicted of forgery and burglary); *State v. Norman*, 484 So. 2d 952 (La. Ct. App. 1986) (defendant was convicted of forgery).

15. In her dissenting opinion, Justice Sykes asserted: "Conditioning the right to procreate upon proof of financial or other fitness may appear on the surface to be an appropriate solution in extreme cases such as this, but it is unprecedented in this country, and for good reason." *State v. Oakley*, 629 N.W.2d 200, 222 (Wis. 2001) (Sykes, J., dissenting).

16. A USA TODAY article called the decision "an unprecedented action against 'deadbeat

In order to differentiate Oakley from past defendants on whom restrictions of procreation have been imposed, a review of these different types of defendants in past cases must take place. State appellate courts in the past thirty years have seen roughly fifteen challenges to lower courts' imposition of procreative restrictions.¹⁷ These cases involved defendants who were abusive to children physically or sexually,¹⁸ defendants who had been convicted of child neglect,¹⁹ and defendants who had been convicted of non-child-related crimes.²⁰ The only two cases out of these fifteen cases before *Oakley* in which procreative restrictions were upheld, *State v. Kline* and *Krebs v. Schwarz*, involved defendants who were convicted of crimes of physical child abuse.

The Wisconsin Court of Appeals, in *Krebs v. Schwarz*, became one of the first appellate courts to uphold a probation condition that had the effect of limiting the convicted individual's procreative rights.²¹ Defendant Krebs challenged a probation condition that required his probation officer's approval before entering into a sexual relationship as a violation of his constitutional right of privacy.²² This practical limitation on his right to procreate stemmed from

dads' The dissenters said it was the first time any court in the nation had limited someone's right to procreate based on the ability to pay child support." Joan Biskupic, 'Deadbeat Dad' Told: No More Kids Wis. Court Backs Threat of Prison, USA TODAY, July 11, 2001, at 1A.

17. *People v. Zaring*, 10 Cal. Rptr. 2d 263 (Ct. App. 1992); *People v. Pointer*, 199 Cal. Rptr. 357 (Cal. Ct. App. 1984); *People v. Dominguez*, 64 Cal. Rptr. 290 (Ct. App. 1967); *Thomas v. State*, 519 So. 2d 1113 (Fla. Dist. Ct. App. 1988); *Howland v. State*, 420 So. 2d 918 (Fla. Dist. Ct. App. 1982); *Wiggins v. State*, 386 So. 2d 46 (Fla. Dist. Ct. App. 1980); *Rodriguez v. State*, 378 So. 2d 7 (Fla. Dist. Ct. App. 1979); *People v. Negrete*, 629 N.E.2d 687 (Ill. App. Ct. 1994); *Trammell v. State*, 751 N.E.2d 283 (Ind. Ct. App. 2001); *State v. Mosburg*, 768 P.2d 313 (Kan. Ct. App. 1989); *State v. Norman*, 484 So. 2d 952 (La. Ct. App. 1986); *State v. Livingston*, 372 N.E.2d 1335 (Ohio Ct. App. 1976); *State v. Kline*, 963 P.2d 697 (Or. Ct. App. 1998); *State v. Oakley*, 629 N.W.2d 200 (Wis. 2001); *Krebs v. Schwartz*, 568 N.W.2d 26 (Wis. Ct. App. 1997).

Note that in twelve out of these fifteen cases, the reviewing court struck down the lower court's restriction on the defendant's procreative rights. The Wisconsin and Oregon courts of *State v. Oakley*, *Krebs v. Schwartz*, and *State v. Kline*, upheld the restrictions on defendants' procreative rights.

18. *Rodriguez v. State*, 378 So. 2d 7 (Fla. Dist. Ct. App. 1979); *State v. Livingston*, 372 N.E.2d 1335 (Ohio Ct. App. 1976); *State v. Kline*, 963 P.2d 697 (Or. Ct. App. 1998); *Krebs v. Schwartz*, 568 N.W.2d 26 (Wis. Ct. App. 1997).

19. *People v. Pointer*, 199 Cal. Rptr. 357 (Ct. App. 1984); *Howland v. State*, 420 So. 2d 918 (Fla. Dist. Ct. App. 1982); *Trammell v. State*, 751 N.E.2d 283 (Ind. Ct. App. 2001); *State v. Mosburg*, 768 P.2d 313 (Kan. Ct. App. 1989).

20. *People v. Zaring*, 10 Cal. Rptr. 2d 263 (Ct. App. 1992); *People v. Dominguez*, 64 Cal. Rptr. 290 (Ct. App. 1967); *Thomas v. State*, 519 So. 2d 1113 (Fla. Dist. Ct. App. 1988); *Wiggins v. State*, 386 So. 2d 46 (Fla. Dist. Ct. App. 1980); *State v. Norman*, 484 So. 2d 952 (La. Ct. App. 1986).

21. 568 N.W.2d at 29.

22. The term of probation stated specifically, "You shall not enter into any dating, intimate, or sexual relationship with any person without first discussing this with your agent and obtaining

Krebs's status as a sexual offender: He had been convicted of first-degree sexual assault of his daughter and received a twenty-year prison term that was stayed in exchange for a twenty-year probationary period.²³

The court, in upholding the limitation on the defendant's sexual freedom, reasoned that its requirement that he gain approval from his probation officer before engaging in a sexually intimate relationship did not constitute a complete ban on his right to procreate.²⁴ Rather, the condition survived constitutional scrutiny since it was not overly broad, was reasonably related to his rehabilitation, and was also related to the protection of the public.²⁵ The court emphasized the second part of this analysis in its determination that the specific nature of Krebs's offense rendered such a probation condition appropriate and constitutional: "[T]he condition is rationally related to Krebs' rehabilitation because it forces him to be honest with others by confronting and admitting to his sexually deviant behavior. Admission of sexually deviant behavior is necessary to help prevent relapse."²⁶

The next year, the Oregon Court of Appeals upheld a more directly restrictive condition on the defendant's procreative rights in *State v. Kline*:²⁷ This criminally abusive defendant was ordered not to father any children until he successfully completed treatment relating to his abusive behavior.²⁸ The charges against Kline, a father of two, were far from minor. The court included a gruesome summary of Kline's many incidents of violence toward his children. One such graphic report is as follows:

[Kline] broke [his son's] arm and inflicted numerous bruises on him . . . [and] was physically and emotionally abusive to both his wife and [their son]. Defendant abused methamphetamine and, when high, he was angry and hostile. When his daughter would cry, defendant would hold her close to his face while screaming obscenities at her. Defendant would also leave the baby in her crib for an entire day while preventing

your agent's approval." *Id.* at 27 n.1.

23. *Id.*

24. The court stated,

[T]he condition does not prohibit Krebs' right to procreate as he claims. Rather, he is free to maintain platonic relationships with individuals; it is only when the relationship turns intimate and/or to sexual gratification that Krebs needs to seek permission from his probation officer. Although this may be a constriction of a constitutional right, it is not a denial of it. We conclude that the condition . . . is no more than an inconvenience.

Id. at 28.

25. *Id.*

26. *Id.*

27. 963 P.2d 697, 699 (Or. Ct. App. 1998).

28. The specific condition that Kline challenged stated: "You may not without prior written approval by the Court following the successful completion of a drug treatment program and anger management program and any other program directly related to counseling related to your conduct towards children[,] father any child." *Id.* (alteration in original).

his wife from checking on her. [Defendant's wife] also reported seeing defendant throwing the baby into her crib.²⁹

Based on this litany of abusive acts, the Oregon Court of Appeals upheld the lower court's imposition of the restriction on his procreative rights, reasoning that the defendant's "pattern of abusive behavior . . . warranted a provision keeping defendant from young children, . . . at least until he completes extensive counseling for his acknowledged drug and anger problems."³⁰

While Oakley's failure to financially support his nine children constitutes a serious criminal act, he stands apart from the violently abusive defendants in *Krebs* and *Kline*. Unlike Krebs and Kline, Oakley was not before the court for violent behavior or abusive tendencies.³¹ Oakley's violation, while grave and harmful to his children, did not rise to the level of physical abuse. Rather, it was

29. *Id.* at 698. More such accounts fill the court's summary of the charges against Kline, including a later incident in which Kline broke his daughter's leg:

When asked specifically about his daughter's leg, defendant answered that, "when he entered the room, the baby's leg was twisted and stuck in the crib" and that he just "yanked it out." He further stated that, "because he didn't hear a crack, he thought that the child's leg was not injured despite her screaming."

Id. at 699.

30. *Id.*

31. In the July 10, 2001, decision of *Oakley*, the majority made mention of past charges of child intimidation on Oakley's record as further justification for their support of the trial court's extreme probation condition. The court asserted that Oakley had repeat offender status after "intimidating two witnesses in a child abuse case—where one of the victims was his own child." *State v. Oakley*, 629 N.W.2d 200, 202 (Wis. 2001).

In its subsequent November 23, 2001, denial of Oakley's request for reconsideration, the court admitted to misconstruing those facts and withdrew all portions of its former opinion that asserted Oakley had committed intimidation of children against one of his own children. *State v. Oakley*, 635 N.W.2d 760, 760 (Wis. 2001) (per curiam). In this supplemental opinion, the court emphasized that its support of the trial court's probation condition limiting Oakley's procreative rights "was based on extraordinary circumstances . . . [that] show an intentional unwillingness to pay child support by a man with a prior criminal record." *Id.*

In her more detailed explanation of the new findings made by the court in response to Oakley's petition for rehearing, Chief Justice Abrahamson, who concurred in the decision to deny the motion for reconsideration, stated: "Oakley asserts that the majority misapprehended his supposed history of intimidation and abuse. The majority and concurrence apparently agree with Oakley on this point and have appropriately corrected in the per curiam opinion the 'facts' stated in the respective opinions." *Id.* at 762 (Abrahamson, C.J., concurring).

Based on the majority's retraction of their former assertions of Oakley's possible abusive behavior and emphasis that their decision was based on the "extraordinary circumstances" of his failure to pay child support alone, Oakley still stands in stark contrast to the violent Krebs and Kline, whose procreative limits were linked directly to proven violent, abusive behavior toward children.

a financial crime that constitutes neglect of his children at best.³²

For this reason, the category of defendants falling under *Oakley*'s heading and the scope of this Note is a new one, totally separate from the child abusers and sexual offenders that have been addressed in the past.³³ Furthermore, this Note's focus is limited to the rights of probationers and thus does not address the broad and equally complex area of prisoners' rights.³⁴

II: PROBATION: THE CONVICT'S PURGATORY

According to Chief Justice Taft in the Supreme Court case *United States v. Murray*,³⁵ "[p]robation is the attempted saving of a man who has taken one wrong step and whom the judge thinks to be a brand who can be plucked from the burning at the time of the imposition of the sentence."³⁶ A modern definition more clearly describes probation as "a sentence under which the court either suspends or substantially reduces the period of incarceration, but retains the authority to condition the defendant's freedom on her agreement to abide by certain requirements and to revoke the grant of freedom should any of the conditions be violated."³⁷

These definitions of probation as a basic middle-ground between the protected freedom of a law-abiding citizen and the highly restricted freedom of an incarcerated criminal leave the true boundaries of probationers' rights all but clearly defined. These boundaries are even further blurred by the dichotomy in treatment between probation rights that do not implicate constitutional issues and those that clearly impinge upon the probationer's fundamental constitutional rights.³⁸ Stopping short of the constitutional issues examined in Part III, the

32. Justice Bradley, in her dissent, emphasizes her disagreement with imposition of the procreative restriction for Oakley's financial failings:

[T]he majority has essentially authorized a judicially-imposed "credit check" on the right to bear and beget children. Thus begins our descent down the proverbial slippery slope. While the majority describes this case as "anomalous" and comprised of "atypical facts," the cases in which such a principle might be applied are not uncommon. The majority's own statistical data regarding non-payment of support belies its contention that this case is truly exceptional.

Oakley, 629 N.E.2d at 220 (Bradley, J., dissenting).

33. In limiting my scope to the new class of defendants that is identified in *Oakley*, I am not endorsing procreative restrictions imposed upon violent offenders like those who have been addressed in prior cases. The permanent or temporary prohibition of procreation for violent offenders is a different topic that requires separate and equally extensive analysis.

34. Prisoners' rights to procreate while incarcerated involve a similarly complex field that requires separate treatment from the rights of probationers. For a deeper discussion of the rights of incarcerated individuals, see Sypherd & Ronan, *supra* note 11.

35. 275 U.S. 347 (1928).

36. *Id.* at 358.

37. Arthur, *supra* note 13, at 29.

38. Courts review probation conditions that impinge on probationers' fundamental

following brief overview will touch on the goals and nature of probation, thus lending support to the thesis that probationers, while entitled to lesser freedoms than the typical law-abiding citizen, are nonetheless deserving of a fundamental layer of rights and freedoms that all non-incarcerated individuals retain.

A. *The Main Goals of Probation*

A trial judge's individual crafting and imposition of the specific terms of probation upon a convicted criminal, authorized by the applicable state or federal statute,³⁹ is a highly discretionary matter.⁴⁰ Within this level of discretion, trial judges are expected to conform to overarching objectives of probation.⁴¹ While

constitutional rights with a greater degree of scrutiny than conditions that do not implicate these fundamental constitutional rights. See, for example, *People v. Zaring*, in which the court applied a three-part test to examine the propriety of the probation condition in general. The court stated, "[E]ven in those instances in which a condition of probation satisfies the [three part] test, 'where a condition of probation impinges upon the exercise of a fundamental right and is challenged on constitutional grounds we must additionally determine whether the condition is impermissibly overbroad.'" 10 Cal. Rptr. 2d 263, 268 (Ct. App. 1992) (quoting *People v. Pointer*, 199 Cal. Rptr. 357 (Ct. App. 1984)). This constitutional over-breadth analysis involves an additional two-part test, which is more fully explored in Part III's constitutional debate.

39. Arthur, *supra* note 13, at 29. "The power of the federal judiciary and of any state court to place a defendant on probation and to impose conditions on her suspension of sentence is created solely by statute." *Id.*

40. In his article *Coercion, Pop-Psychology, and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions*, Professor Andrew Horwitz emphasizes the wide discretion given to trial courts in designing and imposing probation conditions: "[T]rial courts currently operate under virtually no restraints, even when imposing probation conditions that severely restrict the probationer's exercise of his or her constitutional rights." 57 WASH. & LEE L. REV. 75, 78-79 (2000).

Horwitz goes on to describe multiple accounts of unusual probation conditions by trial courts, most of which go unchallenged. Especially shocking were the probation conditions Horwitz described under the category of "Infringements on the Right to Basic Human Dignity." *Id.* at 144.

Perhaps the most common shaming condition requires the offender to publicize either the facts of the case or his or her status as a convicted criminal through the use of a wide variety of media, including wearing a T-shirt, bracelet, or placard; making a speech in front of the courthouse; placing an advertisement in a newspaper; or posting a sign on one's property.

Id.

One such court-ordered publication involved a Georgia trial court's requirement that a convicted drunk driver "wear a fluorescent pink plastic bracelet imprinted with the words 'D.U.I. CONVICT' until further order of the court." *Id.* (quoting *Ballenger v. State*, 436 S.E.2d 793, 794 (Ga. Ct. App. 1993)).

41. Justice Wilcox noted numerous observers' criticisms of trial court judges' tendencies to impose inappropriate terms of probation, crafted after their own idiosyncrasies. He wrote: "We agree that judges should not abuse their discretion by imposing probation conditions . . . that reflect

each state's goals of probation may be worded differently in respective state statutes, the two most common goals of probation, stated broadly, are rehabilitation of the criminal and preservation of public safety.⁴²

B. Meeting Goals of Probation: Level of Freedom Retained by Probationers

Keeping in mind these two broad purposes of probation, along with the high level of deference afforded trial courts in the imposition of probation conditions, reviewing courts test probation conditions under baseline standards that have been developed in their respective jurisdictions. Andrew Horwitz notes "several pervasive themes running through the case law [of appellate courts reviewing probation conditions]: the malleability of the standards of review, the unpredictable and result-oriented application of those standards, and the significant degree to which most appellate courts will defer to the trial court."⁴³ Within this lack of consistency of appellate court treatment of probation conditions, however, patches of commonly applied standards have developed. One of the most common standards of review that appellate courts have imposed in relation to probation conditions that infringe on the right to procreate is a three-part inquiry that was set out by the case of *People v. Dominguez*.⁴⁴ Under this *Dominguez* test, a probation condition will be upheld unless it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality."⁴⁵

only their own idiosyncrasies. Instead, they should use their discretion in setting probation conditions to further the objective of rehabilitation and protect society and potential victims from future wrongdoing." *State v. Oakley*, 629 N.W.2d 200, 206 (Wis. 2001).

42. Kristyn M. Walker, *Judicial Control of Reproductive Freedom: The Use of Norplant as a Condition of Probation*, 78 IOWA L. REV. 779, 791 (1993).

Numerous cases cite these dual aims of probation, including *Oakley*. Justice Wilcox wrote, [W]hen a judge allows a convicted individual to escape a prison sentence and enjoy the relative freedom of probation, he or she must take reasonable judicial measures to protect society and potential victims from future wrongdoing. To that end—along with the goal of rehabilitation—the legislature has seen fit to grant circuit court judges broad discretion in setting the terms of probation.

629 N.W.2d at 206.

43. Horwitz, *supra* note 40, at 97.

44. 64 Cal. Rptr. 290, 293 (Ct. App. 1967).

45. *Id.* Numerous courts employed this test in their initial review of probation conditions that limited procreative rights: *People v. Zaring*, 10 Cal. Rptr. 2d 263 (Ct. App. 1992); *People v. Pointer*, 199 Cal. Rptr. 357 (Ct. App. 1984); *Thomas v. State*, 519 So. 2d 1113 (Fla. Dist. Ct. App. 1988); *Howland v. State*, 420 So. 2d 918 (Fla. Dist. Ct. App. 1982); *Wiggins v. State*, 386 So. 2d 46 (Fla. Dist. Ct. App. 1980); *Rodriguez v. State*, 378 So. 2d 7 (Fla. Dist. Ct. App. 1979); *State v. Norman*, 484 So. 2d 952 (La. Ct. App. 1986); *State v. Livingston*, 372 N.E.2d 1335 (Ohio Ct. App. 1976).

Many of the probation conditions in the foregoing cases passed the *Dominguez* test, but were

A later court applying the *Dominguez* test to a probation condition that limited procreation discussed an additional hurdle that the condition had to clear: "[E]ven in those instances in which a condition of probation satisfies the *Dominguez* . . . test, 'where a condition of probation impinges upon the exercise of a fundamental right and is challenged on constitutional grounds, we must additionally determine whether the condition is impermissibly overbroad.'"⁴⁶ This constitutionally-triggered standard will be further discussed in Part III's constitutional debate.

Oakley's majority did not employ the popular test set out by *Dominguez*, opting instead to move straight to the constitutional analysis of the condition.⁴⁷ While the intricacies of this constitutional analysis will be saved for the constitutional discussion of Part III, the court's assumptions concerning the constitutional rights of probationers versus law-abiding citizens fits well in this discussion of probation. Majority author Justice Wilcox emphasized the inequality between probationers and non-convicted citizens with regard to the level of permissible government intrusion on fundamental constitutional rights: "[I]t is well-established that convicted individuals do not enjoy the same degree of liberty as citizens who have not violated the law. . . . felon[s] on probation [do] not enjoy the same constitutional guarantees as the citizenry."⁴⁸ Thus, *Oakley*'s majority reaffirmed the stance that probationers are entitled to fewer constitutional protections than non-convicted citizens.

Contrary to Wilcox's extreme stance that led to total elimination of *Oakley*'s constitutional right to procreate,⁴⁹ however, probationers may be restricted in their rights without being stripped of the most basic fundamental constitutional freedoms due other law-abiding citizens. The fact that the probationer was spared incarceration reveals that he or she has been adjudged as a less culpable, safer, more freedom-worthy individual than an incarcerated individual. For this reason, it is not inconsistent to recognize the probationer's necessarily restricted rights to participate in acts that may lead to future criminality while simultaneously allowing him or her to retain the non-incarcerated citizen's fundamental foundation of deeply-rooted constitutional freedoms.⁵⁰

invalidated for failing later constitutional scrutiny.

46. *Zaring*, 10 Cal. Rptr. 2d at 268 (quoting *Pointer*, 199 Cal. Rptr. at 364).

47. 629 N.W.2d at 211.

48. *Id.* at 208 (citing *Von Arx v. Schwarz*, 517 N.W.2d 540, 545 (Wis. Ct. App. 1994)).

49. Part III's constitutional discussion will include federal and state support for the widely recognized status of procreation as a fundamental constitutional right.

50. The *Rodriguez* court addressed the importance of retaining a fundamental layer of constitutional rights for probationers: "[C]onstitutional rights of probationers are limited by conditions of probation which are desirable for the purposes of rehabilitation. . . . Trial courts have broad discretion to impose various conditions of probation, but a special condition of probation cannot be imposed if it is so punitive as to be unrelated to rehabilitation." 378 So. 2d at 9.

Horwitz also stressed the probationer's retention of fundamental constitutional rights:

Any hope that an offender might be rehabilitated or have some respect for the criminal justice system in the future would seem to follow more naturally from the imposition of

III. THE CONSTITUTIONAL DEBATE

Embedded in the analysis of probation conditions like the one imposed in *Oakley* is a wealth of constitutional implications concerning the defendant's rights and freedoms protected by both the United States and the defendant's state constitution. Since this analysis does not target the laws of any one state in particular, and each state must afford at least an equivalent level of protection that the Federal Constitution affords, the focus of this Note will remain fixed on the fundamental freedoms protected by the U.S. Constitution, particularly the right of privacy that has been recognized under the liberties protected by the Substantive Due Process Clause of the Fourteenth Amendment.⁵¹

A. *The Rights at Stake*

Among the most frequently cited constitutional provisions are the Due Process Clauses of the Fifth and Fourteenth Amendments.⁵² Both the express rights protected by the Fifth Amendment, which ensures protection on a federal level, and the slightly varied rights protected by the words of the Fourteenth Amendment, which applies at the state level, have been the source of much debate in an age of liberal constitutional interpretation and expanded civil liberties. Because cases like *Oakley* involve the ability of states to limit probationers' rights, the Fourteenth Amendment's pertinence to states makes it the guiding constitutional principle in this area.

The words of the Fourteenth Amendment expressly forbid states to deprive any person of life, liberty, or property without due process of law.⁵³ Beyond the explicitly stated rights of life, liberty and property expressed in the text of the Constitution, however, expanded rights have been interpreted into the Fourteenth Amendment. In the famous Supreme Court case of *Palko v. Connecticut*,⁵⁴ Justice Cardozo made the argument that some rights are so fundamental as to be "implicit in the concept of ordered liberty"⁵⁵ and thus enforceable through the textual protection of liberty in the Fourteenth Amendment.⁵⁶ A significant arena of rights that was subsequently recognized falls under the heading of privacy.

1. *Privacy Rights*.—A landmark case in the development of the right of

a sentence that respects the rights and dignity of the offender than from the imposition of a sentence that shows a disregard for those vital issues.

Horwitz, *supra* note 40, at 158. Thus, constitutionally intrusive probation conditions must be carefully scrutinized under the requirement that they be related to rehabilitation of the probationer.

51. U.S. CONST. amend. XIV, § 1.

52. U.S. CONST. amend. V: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

53. *Id.*

54. 302 U.S. 319 (1937).

55. *Id.* at 325.

56. *Id.*

privacy is U.S. Supreme Court case *Griswold v. Connecticut*.⁵⁷ In *Griswold*, a Connecticut statute imposing penalties for individuals using and assisting in the use of contraceptives was struck down as an unconstitutional invasion of the right of marital privacy.⁵⁸ Another landmark case involving the right of privacy is *Roe v. Wade*, which held unconstitutional a Texas law prohibiting abortion except to save the life of the mother.⁵⁹

The privacy interests protected by *Griswold* and *Roe* are slightly different. Beyond the facial distinction of the specific rights protected (right to use contraceptives in *Griswold* and the right to choose to terminate pregnancy in *Roe*), the underlying nature of privacy rights in the two cases illustrates two distinct lines of privacy cases:⁶⁰ those involving protection of private matters from the public, as emphasized in *Griswold*,⁶¹ and the protection of personal autonomy, as emphasized in *Roe*.⁶² Within its branch of personal autonomy, *Roe*'s majority author Justice Blackmun listed several protected activities:⁶³

57. 381 U.S. 479 (1965). In these early stages of a recognized right of privacy, Justices struggled to find a textual basis to justify their holding. Justice Douglas, in his majority opinion, grounded the protection of the right of privacy in the Bill of Rights: "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." *Id.* at 484. In his concurrence, Justice Goldberg instead relied on the Ninth Amendment's demand that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." *Id.* at 488 (Goldberg, J., concurring) (quoting U.S. CONST. amend. IX). Finally, Justice White's concurrence alluded to the most widely recognized source of the right to privacy today, the Fourteenth Amendment liberties preserved by its Due Process Clause. *Id.* at 502 (White, J., concurring).

58. *Id.* at 485.

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Id.

59. 410 U.S. 113, 162-65 (1973).

60. WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW: CASES AND MATERIALS 570-71 (Robert Clark et al. eds., Foundation Press 11 ed. 2001).

61. The chief concern in *Griswold* was the implication of intrusion upon the marital bedroom that would be required in order to uphold the statute prohibiting contraceptives. Justice Douglas stated: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship." 381 U.S. at 485-86.

62. In *Roe* the majority emphasized the protected autonomy of women and physicians performing abortions, holding that the right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153.

63. *Id.* at 152-53.

activities relating to marriage,⁶⁴ contraception,⁶⁵ family relationships,⁶⁶ and child rearing and education.⁶⁷ An additional activity protected under the personal autonomy branch of Fourteenth Amendment privacy is procreation.⁶⁸

2. *The Right of Procreation*.—The right of procreation, as a constitutional right insured by the fundamental liberties of the Fourteenth Amendment, has been widely recognized on both state⁶⁹ and federal⁷⁰ levels. The Supreme Court case of *Skinner v. Oklahoma*,⁷¹ decided on equal protection grounds, invalidated a state statute that provided for compulsory sterilization of repeat offenders of crimes of moral turpitude.⁷² Justice Douglas recognized the fundamental nature of the right to procreate in his statement, “We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.”⁷³ After thus recognizing the constitutionally fundamental right of procreation, the *Skinner* court struck down the Oklahoma statute, holding that it failed to survive the strict constitutional scrutiny that impingement of such a right required under the Equal Protection Clause.⁷⁴

While Oakley’s right to procreate does not involve equal protection grounds, *Skinner* serves as useful precedent for the treatment of impingement of constitutional rights with a high level of scrutiny. Since one of the main disagreements among the Wisconsin Supreme Court Justices in *State v. Oakley* centered around the level of scrutiny with which to evaluate the trial court’s

64. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

65. *Eisenstadt v. Baird*, 405 U.S. 438, 453-545 (1972).

66. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

67. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

68. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

69. *See, e.g., People v. Pointer*, 199 Cal. Rptr. 357 (Ct. App. 1984).

70. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

71. *Id.*

72. *Id.* at 536. The challenged statute was Oklahoma’s Habitual Criminal Sterilization Act. The *Skinner* court summarized the statute as follows: “If the . . . defendant is an ‘habitual criminal’ and . . . he ‘may be rendered sexually sterile without detriment to his or her general health,’ then the court ‘shall render judgment to the effect that said defendant be rendered sexually sterile.’” *Id.* at 537.

The statute was invalidated upon equal protection grounds because it treated individuals who had committed the crimes of larceny and embezzlement differently: The statute listed larceny as a crime that counted towards the tolling of crimes that could lead to an individual’s designation as a habitual offender. Embezzlement did not appear in this list. Justice Douglas, in his majority opinion, found that sterilization of a criminal who committed larceny (a crime with elements virtually identical to the crime of embezzlement) was an unequal penalty to the embezzler’s less restrictive punishment. *Id.* at 539.

73. *Id.* at 541.

74. *Id.*

impingement on his constitutional right to procreate, a discussion of possible levels of review will clarify the issues.

B. How Far May Judges Go? Tests Analyzing the Extent to Which Probation May Impinge on Criminals' "Fundamental" Constitutional Rights

The Wisconsin Supreme Court decision in *Oakley* was far from unanimous: Justice Jon P. Wilcox authored a one-man majority opinion. Justices William A. Bablitch and N. Patrick Crooks both filed concurring opinions. Chief Justice Shirley Abrahamson, Justice Ann Walsh Bradley, and Justice Diane S. Sykes all dissented.⁷⁵

Among the divisive disagreements concerning the treatment of the trial court's unprecedented probation condition, one of the most contested issues was the level of deference to afford the lower court's impingement upon *Oakley's* constitutional right of procreation. The debate over the proper standard of review in *Oakley* stems from the lack of consistent precedent in two important areas of state and federal analysis: the appropriate level of review to afford fundamental rights under the Fourteenth Amendment's Substantive Due Process requirements, and the proper level of review to afford probationers whose constitutional rights are imposed upon.

1. *Substantive Due Process Standards for Law Abiding Citizens.*—A significant set of cases dealing with a right of privacy under the concept of substantive due process are the abortion cases of *Roe v. Wade*,⁷⁶ *Planned Parenthood v. Casey*,⁷⁷ and *Stenberg v. Carhart*.⁷⁸ In *Roe*, the woman's right to choose whether or not to procreate was deemed a fundamental constitutional right under the Fourteenth Amendment, any infringement of which was subject to strict scrutiny review.⁷⁹ This strict scrutiny review placed a burden on the state to show that it had a compelling interest that was narrowly tailored to the regulatory infringement it imposed.⁸⁰

The strict scrutiny foundation that was established in *Roe*, however, was uprooted nineteen years later in *Planned Parenthood v. Casey*,⁸¹ a case that involved a challenge to a Pennsylvania law imposing requirements on women and abortion clinics, such as required consent from the father of the unborn child, parental consent for under-age women, a twenty-four-hour waiting-period before a woman could obtain an abortion, and others.⁸² In the *Casey* Court's review of these intrusions on the woman's previously established fundamental Fourteenth

75. *State v. Oakley*, 629 N.W.2d 200 (Wis. 2001).

76. 410 U.S. 113 (1973).

77. 505 U.S. 833 (1992).

78. 530 U.S. 914 (2000).

79. 410 U.S. at 155-56.

80. *Id.* at 155.

81. 505 U.S. 833 (1992).

82. The challenged law was the Pennsylvania Abortion Control Act of 1982, as amended in 1988 and 1989. 18 PA. CONS. STAT. §§ 3203-20 (1990).

Amendment right, plurality author Justice O'Connor suggested the down-grading of the level of scrutiny from strict scrutiny to her proposed "undue burden" test.⁸³ Under this undue burden analysis, if a regulation had a "purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus," it would be struck down.⁸⁴ Within her suggested undue burden test, Justice O'Connor placed the burden of establishing the undue burden on the challenger, rather than the state.⁸⁵ However, because the majority of the Court failed to adopt the undue burden portion of Justice O'Connor's opinion,⁸⁶ it remained a blurry suggestion that did not directly overrule *Roe*'s strict scrutiny requirement.

The uncertainty over strict scrutiny versus undue burden was somewhat resolved in the 2000 case of *Stenberg v. Carhart*.⁸⁷ Justice Breyer authored the majority opinion in this case involving a challenge to a state law that prohibited partial birth abortions.⁸⁸ The majority adopted a variation of Justice O'Connor's previously suggested undue burden standard: First, as announced in *Casey*, if a regulation "[had] a purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus," it would be struck down.⁸⁹ However, the *Stenberg* majority shifted the burden to establish or negate such an undue burden from the challenger to the state.⁹⁰ Thus *Stenberg* occupied a middle-ground between *Roe* and *Casey*: While the higher strict scrutiny standard in *Roe* was vacated, the increased difficulty the lower undue burden standard imposed on the challenger was appeased by the placing of the burden of proof upon the state.

The amorphous middle ground that *Stenberg* occupies reflects the overall trend in standards of review of impingement upon Fourteenth Amendment fundamental rights: As stated by a popular treatise on constitutional law, "[t]he standard of review for fundamental rights cases, under . . . the due process clause[] . . . remains unclear. Lower courts . . . must examine the rulings regarding a specific fundamental right to determine . . . what type of standard is

83. 505 U.S. at 874. Justice O'Connor stated specifically, "[o]nly where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause." *Id.*

84. *Id.* at 877.

85. While Justice O'Connor did not explicitly place the burden on the challenger, she effectively did so throughout her analysis by reviewing evidence offered by the challenger and then explaining whether such evidence was sufficient to constitute an undue burden. *Id.* at 884-85.

86. *Id.* at 844.

87. 530 U.S. 914 (2000).

88. NEB. REV. STAT. ANN. § 28-328(1) (Supp. 1999).

89. 530 U.S. at 921 (quoting *Casey*, 505 U.S. at 877).

90. Like in *Casey*, the majority does not expressly place the burden on one party, but in *Stenberg*, the majority effectively shifts the burden to the state by holding for the challenger when the state has failed to provide adequate evidence to negate the finding of an undue burden. *Id.* at 932.

actually being used.”⁹¹ This lack of a uniform standard in this complex constitutional area thus illustrates the basis for controversy and uncertainty in the *Oakley* court’s attempt to properly review the limitation on Oakley’s right to procreate.

2. *Constitutional Standards for Probationers.*—Even more uncertain than the level of review to afford *law-abiding citizens’* fundamental substantive due process rights is the level to afford to *criminally convicted probationers’* constitutional rights. This topic falls squarely in Andrew Horwitz’s discussions in *Coercion, Pop-Psychology, and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions*.⁹² As already asserted in the probation discussion of Part II of this Note, appellate courts’ treatment of probation conditions, in general, is far from uniform.⁹³ In his later discussion of constitutional challenges to probation conditions, Horwitz further observes a lack of uniformity in the narrow area of review of conditions that impinge upon probationers’ fundamental constitutional rights.⁹⁴ Horwitz asserts,

[S]ome jurisdictions claim to take a more serious look at probation conditions that infringe on constitutional rights, using language like “special scrutiny.” However, the standard of review in these jurisdictions is some form of a loosely worded, result-oriented balancing test, often still framed under the rubric of reasonableness and abuse of discretion.⁹⁵

Thus, like the individual areas of appellate review of probation conditions and substantive due process rights, the more specific combination of the two (appellate review of probation conditions that impinge upon substantive due process rights) becomes extremely complex due to inconsistencies in precedence.

Justice Wilcox did not address this lack of uniformity when he adopted his “reasonableness” standard of review in *Oakley*.⁹⁶ Citing a long string of past cases that did not require least restrictive means analyses,⁹⁷ Justice Wilcox suggested that the proper test to apply to the trial court’s probation condition in *Oakley* was *Edwards v. State*’s test of whether the probation condition was “not overly broad” and “reasonably related to the person’s rehabilitation.”⁹⁸

On the opposite end of the spectrum, dissenting Justice Bradley argued for utilization of the traditional strict scrutiny test often employed to evaluate

91. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.4 (Jesse H. Choper et al. eds., West 5th ed. 1995) (1978).

92. Horwitz, *supra* note 40.

93. *Id.* at 97.

94. *Id.* at 99-154.

95. *Id.* at 100.

96. *State v. Oakley*, 629 N.W.2d 200, 212 (Wis. 2001).

97. *Id.* at 212 n.27. Justice Wilcox claims that “there is abundant case law that a probation condition infringing on a constitutional right is analyzed under the . . . well-established reasonability standard.” *Id.*

98. *Id.* at 210 (quoting *Edwards v. State*, 246 N.W.2d 109, 111 (Wis. 1976)).

impingement of fundamental constitutional liberties.⁹⁹ She argued that this strict scrutiny analysis required that the state establish a compelling interest in imposing the probation condition and that the condition must be narrowly construed to meet that interest.¹⁰⁰ Bradley argued for strict scrutiny “[b]ecause of the heightened importance of the liberty interest at stake.”¹⁰¹

A compromise of the two differing tests appears in Justice Sykes’s dissent: She recognized the reasonableness test from *Edwards* that Justice Wilcox utilized while disagreeing with his failure to include a less restrictive means evaluation.¹⁰² Justice Sykes instead found that the probation condition should be invalidated as unconstitutionally overbroad since it was not reasonably related to Oakley’s rehabilitation and less restrictive means could have achieved the state’s goal of rehabilitation.¹⁰³ This approach by Justice Sykes appears under the constitutional over-breadth analyses in numerous cases that evaluated trial courts’ limitations of procreative rights.¹⁰⁴

IV. REVIEW OF PROBATION CONDITIONS THAT IMPINGE ON CONSTITUTIONAL RIGHTS: THE TEST OF CHOICE

Justice Wilcox’s supportive list of cases makes his amorphous reasonability standard somewhat convincing at first blush. However, more rigorous research of probation conditions that are closely aligned with the constitutional right to procreate yield a separate and equally impressive list of cases supporting Sykes’s method of review of the probation term in *Oakley*.¹⁰⁵ By choosing a more simply-stated reasonability standard, Justice Wilcox oversimplified his analysis and overlooked a wealth of applicable case law that addresses the specific issues of procreative restrictions in terms of probation.

This wealth of on-point case law supports a two-tiered test of probation conditions that impinge upon procreative rights.¹⁰⁶ The first tier of this two-

99. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374 (1978).

100. *Oakley*, 629 N.W.2d 200 at 217 (Bradley, J., dissenting).

101. *Id.*

102. *Id.* at 222 (Sykes, J., dissenting).

103. *Id.*

104. See *People v. Zaring*, 10 Cal. Rptr. 2d 263, 268 (Ct. App. 1992); *People v. Pointer*, 199 Cal. Rptr. 357, 364 (Ct. App. 1984); *Rodriguez v. State*, 378 So. 2d 7, 9 (Fla. Dist. Ct. App. 1979); *Trammell v. State*, 751 N.E.2d 283, 289 (Ind. Ct. App. 2001); *State v. Mosburg*, 768 P.2d 313, 315 (Kan. Ct. App. 1989).

105. See *supra* note 104.

106. *People v. Zaring*, 10 Cal. Rptr. 2d 263, 268 (Ct. App. 1992); *People v. Pointer*, 199 Cal. Rptr. 357, 364 (Ct. App. 1984); *People v. Dominguez*, 64 Cal. Rptr. 290 (Ct. App. 1967); *Thomas v. State*, 519 So. 2d 1113 (Fla. Dist. Ct. App. 1988); *Howland v. State*, 420 So. 2d 918 (Fla. Dist. Ct. App. 1982); *Wiggins v. State*, 386 So. 2d 46 (Fla. Dist. Ct. App. 1980); *Rodriguez v. State*, 378 So. 2d 7, 9 (Fla. Dist. Ct. App. 1979); *Trammell v. State*, 751 N.E.2d 283, 289 (Ind. Ct. App. 2001); *State v. Mosburg*, 768 P.2d 313, 315 (Kan. Ct. App. 1989); *State v. Norman*, 484 So. 2d 952 (La. Ct. App. 1986); *State v. Livingston*, 372 N.E.2d 1335 (Ohio Ct. App. 1976).

tiered test is imposition of the aforementioned *Dominguez* test for probation conditions.¹⁰⁷ *Dominguez*'s three-step test results in the probation condition being upheld unless it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality."¹⁰⁸ The second tier of the two-tiered test is triggered when a constitutional right is at stake. This portion of the analysis asks whether the probation condition is overbroad and contains two considerations: whether the condition is reasonably related to the probationer's rehabilitation and whether there are less intrusive means of accomplishing the state's goal of rehabilitation.¹⁰⁹ Since the main point of disagreement between Justice Wilcox's and Justice Sykes's approaches was the propriety of least intrusive means analysis, it is important to emphasize that the on-point cases that reached the second tier constitutional over-breadth analysis all included least restrictive means analyses.¹¹⁰ The remaining courts deciding cases in the area of procreative rights for probationers that did not include a least restrictive means analysis merely did so because they concluded that the condition violated one of the three requirements of *Dominguez* tier one, thus holding the condition invalid before reaching the constitutional analysis.¹¹¹

In applying this two-tiered test to *Oakley*, the probation condition fails both tiers. The most comparable case for analysis under the first tier is the Florida case of *Howland v. State*.¹¹² In *Howland*, the defendant father was convicted of negligent child abuse on his infant child. The court sentenced the father to 364 days in prison and five years of probation. The court imposed three conditions on the father's probation: He was prohibited from "(1) having any contact with his child, who was the victim in [the] case; (2) fathering any other children while on probation; and (3) residing with any child under 16 years of age while on probation."¹¹³

Employing the three-part test set out in *Dominguez*, the *Howland* court upheld the first and third conditions of the father's probation, but struck down the

107. *Dominguez*, 64 Cal. Rptr. at 293.

108. *Id.*

109. *Zaring*, 10 Cal. Rptr. 2d at 268 (quoting *Pointer*, 199 Cal. Rptr. at 364).

110. For example, the court in *People v. Pointer* stated, "[i]f available alternative means exist which are less violative of a constitutional right and are narrowly drawn so as to correlate more closely with the purpose contemplated, those alternatives should be used." 199 Cal. Rptr. at 365.

Other courts included nearly identical language in their analyses. See, e.g., *Zaring*, 10 Cal. Rptr. 2d at 268; *Rodriguez*, 378 So. 2d at 9; *Trammell*, 751 N.E.2d at 289; *Mosburg*, 768 P.2d at 315.

111. *People v. Dominguez*, 64 Cal. Rptr. 290 (Ct. App. 1967); *Thomas v. State*, 519 So. 2d 1113 (Fla. Dist. Ct. App. 1988); *Howland v. State*, 420 So. 2d 918 (Fla. Dist. Ct. App. 1982); *Wiggins v. State*, 386 So. 2d 46 (Fla. Dist. Ct. App. 1980); *State v. Norman*, 484 So. 2d 952 (La. Ct. App. 1986); *State v. Livingston*, 372 N.E.2d 1335 (Ohio Ct. App. 1976).

112. 420 So. 2d 918 (Fla. Dist. Ct. App. 1982).

113. *Id.* at 919.

second condition that prohibited him from fathering any more children during his probation.¹¹⁴ The court reasoned that prohibiting the father from having contact with the abused child and preventing him from living with young children related to his underlying crime of child abuse, but preventing him from having more children proved unrelated to the crime of child abuse.¹¹⁵ Furthermore, since the act of fathering children is in itself not a criminal act, the condition violated the second part of the *Dominguez* test.¹¹⁶ Finally, since the other two conditions preventing the father's sustained contact with children could effectively prevent future criminality, the further intrusion of prohibiting procreation was unnecessary.

Under this analysis, the condition in *Oakley* also fails. Like the crime of the father in *Howland*, whose parenting future children bore no relationship to the crime for which he was convicted, Oakley's crime of failing to provide child support to his existing children bears an attenuated connection to the fathering of more children at best. The mere fact that both the crime and procreating involve the common denominator of children does not create a sufficient link between the two. Additionally, the condition in *Oakley* similarly violates the second part of the *Dominguez* test: As the court in *Howland* found, procreating is itself noncriminal conduct. Lastly, just as other probation conditions could adequately achieve the desired effect of preventing future criminality in the father in *Howland*, impingement of Oakley's procreative rights is not a necessary means to achieve the desired ends of the condition. Rather, to better achieve the goals of protection of society and rehabilitation of the probationer, the *Oakley* court could have instead imposed a requirement that Oakley obtain employment and have child support payments garnished from his pay.¹¹⁷

Even if the condition prohibiting procreation passed the first tier of review, the condition fails to survive constitutional muster. As *People v. Zaring* stated, "[W]here a condition . . . impinges upon . . . a fundamental right and is challenged on constitutional grounds we must . . . determine whether the condition is impermissibly overbroad."¹¹⁸ *Zaring* went on to define this overbreadth analysis as inclusive of two main inquiries. First, the condition must bear a reasonable relationship to the compelling state interest in the probationer's rehabilitation, and second, there must be no less intrusive means to achieve the desired goal.¹¹⁹ Under this analysis, *Oakley's* condition fails.

First, the prohibition of procreation for Oakley bears no reasonable relationship to the state's compelling interest in rehabilitating him. The court gives very little guidance to Oakley in the imposition of its probation condition: Rather than giving him a rough set of guidelines through which to follow the probation condition, the court merely places a blanket ban on his reproductive

114. *Id.*

115. *Id.* at 919-20.

116. *Id.* at 920.

117. See *infra* note 123.

118. 10 Cal. Rptr. 2d at 268 (quoting *People v. Pointer*, 199 Cal. Rptr. at 364).

119. *Id.*

freedoms.¹²⁰ The majority nowhere states an expectation that Oakley is to refrain from having sex altogether. It leaves unanswered the question of what it would do in the face of Oakley's honest attempts and subsequent failures to refrain from having future children—even regularly and properly used contraceptives have failure rates.¹²¹ The court nowhere discusses the possibility that Oakley could fervently use contraceptives and still fail to comply with his probation condition.¹²²

Moreover, by ordering Oakley to refrain from fathering future children, the court took no steps to rehabilitate Oakley into the kind of law-abiding, financially supportive parent that will aid the children he currently has. While prevention of future criminality is an important end achieved by the prohibition of procreation for this class of defendants, it does nothing to solve the existing problem faced by the current victims of Oakley's deadbeat parentage.

Under the second part of the over-breadth analysis, the *Oakley* court's condition similarly fails. More effective, less restrictive alternatives, such as

120. *State v. Oakley*, 629 N.W.2d 200, 201 (Wis. 2001).

121. An article in the periodical CONTEMPORARY OB/GYN reported the following failure rates for common forms of contraception: "Barrier methods" of contraception (such as the condom, diaphragm, spermicides, and the cervical cap) are reported to have failure rates of five percent and higher. Intra Uterine Devices (IUDs) (devices surgically placed in women's uteruses to prevent pregnancy) have a failure rate between one percent and 2.9%. Norplant, a device implanted in the woman's arm that emits hormones that prevent pregnancy has a reported failure rate of less than one percent, but this failure rate increases for women who weigh more than 154 pounds. Andrew Kaunitz & Donald Zimmer, Jr., *Cover Story: A Medicolegal Evaluation of Reversible Contraceptives*. CONTEMPORARY OB/GYN, May 1, 2000, vol. 5 at 74-110.

122. "Will probation officers monitor Oakley's bedroom, and the use of contraceptives by himself and sex partners? Suppose he conceives under the mistaken belief that his partner was on the pill. Would that trigger an embarrassing evidentiary hearing before the sentencing judge?" Bruce Fein, *Irresponsible Fatherhood*, WASH. TIMES, Aug. 7, 2001, at A12.

The cases of *Pointer* and *Trammell* also raised this point:

It deserves to be noted that the [no-pregnancy] condition imposed did not include a prohibition on sexual intercourse. As the trial judge stated at the sentencing hearing: "I would never require somebody to have no sexual activity; I don't think that's even suggested." The conceded fact that even the best birth control measures sometimes fail raises the possibility that appellant could conceive despite reasonable precautions to comply with the condition imposed.

Trammell v. State, 751 N.E.2d 283, 289 n.8 (quoting *People v. Pointer*, 199 Cal. Rptr. 357, 366 n.12 (Ct. App. 1984)).

This problem also arose in *People v. Dominguez*: The woman on whom the probationary procreative restriction had been placed challenged the condition when her probation officer revoked her probation after she had become pregnant. The probationer claimed that she had been using birth control at the time of her pregnancy, but that its defective nature resulted in her pregnancy. The California Court of Appeals overturned the trial court's revocation of probation, stating that "[c]ontraceptive failure is not an indicium of criminality." 64 Cal. Rptr. 290, 293 (Ct. App. 1967)

forcing the father to obtain employment and have his wages garnished,¹²³ would much more effectively satisfy the goals of rehabilitating Oakley into a more productive father for the children he already has.¹²⁴

V. THE PRACTICAL DEBATE: THE EXTRA-CONSTITUTIONAL PROBLEMS WITH OAKLEY'S PUNISHMENT

Aside from the complex constitutional issues implicated by the prohibition of procreation for non-sex offenders and non-child abusers, an entire arena of practical problems surfaces with this type of probation condition.¹²⁵ These problems can be divided into two types of categories: enforceability problems and public policy problems.

A. Enforceability Problems

Many of the conundrums raised by a probation condition generally prohibiting procreation were peremptorily raised in the constitutional analysis of over-breadth in Part IV.¹²⁶ The probation condition in *Oakley* sends Oakley to prison the moment he fathers a child. There are two main problems with enforcing such a probation condition.

First, in its broad, general forbiddance, the *Oakley* court does not discuss what kind of consequences Oakley would face if he broke his probation by fathering a child, yet had acted as responsibly as expected, in properly using contraceptives in order to prevent such an occurrence.¹²⁷ One would expect that the court would view Oakley's responsible use of contraceptives differently than promiscuous and unprotected sex, yet how could the court discover Oakley's culpability in such a scenario?¹²⁸ It would be next to impossible to prove or disprove that he had acted responsibly in trying to prevent pregnancy.

Secondly, if Oakley fathered another child, it is highly likely that such a violation of his probation term could go undetected. Were a woman to violate a similar condition, her violation would quickly become apparent as she carried the child to term and became visibly pregnant. The man's situation is drastically

123. Employment and wage garnishing is a suggestion made by both Justices Bradley and Sykes in their separate dissenting opinions. *State v. Oakley*, 629 N.W.2d 200 (Wis. 2001).

124. Since Part VI of this Note more extensively addresses alternative means of dealing with defendants like Oakley, a majority of the alternative means analysis will be delayed until Part VI.

125. For a wealth of discussion concerning many of the practical problems of this probation condition, see several of the local, nationwide, and international news stories on the *Oakley* case: Vivian Berger, *Bedroom Sentence*, NAT'L L.J., Sept. 17, 2001, at A21; Bruce Fein, *Irresponsible Fatherhood*, WASH. TIMES, Aug. 7, 2001, at A12; Leonard Pitts, Jr., 'Make a Baby, Go to Jail' *Ruling Misguided*, BALTIMORE SUN, July 20, 2001, at 21A; *Punishing A Deadbeat Dad*, TAMPA TRIB., July 18, 2001, at 16; Kathleen Parker, *Reproductive Limits by Court Order?*, WASH. TIMES, July 16, 2001, at A14.

126. See *supra* Part IV.

127. See *supra* notes 121-22.

128. See *supra* note 122.

different, however, as his fatherhood is not evidenced by any such drastic change in physical appearance. Thus, a probation condition prohibiting the fathering of children would likely be difficult to enforce against the male probationer.

B. Public Policy Problems

The probation condition in *Oakley* is fraught with public policy problems. Courts frequently turn to public policy analysis as a final check to ensure the attainment of the just results they are expected to reach.¹²⁹ Policy did not escape the minds of the Wisconsin Justices in *Oakley*: Justice Wilcox's majority opinion included over a page of discussion of the "crisis" deadbeat parentage has created.¹³⁰ Justice Wilcox, unlike his dissenting colleagues, however, failed to explore the policy implications of the probation condition he chose to uphold. Both Justices Sykes and Bradley, in their dissenting opinions, cited policy problems resulting from probation conditions prohibiting procreation.¹³¹

1. *Allowing Birth of Child to Carry Criminal Sanctions.*—In the opening statements of her dissenting opinion, Justice Bradley asserted "[t]he majority's decision allows, for the first time in our state's history, the birth of a child to carry criminal sanctions."¹³² The majority praised the trial court's probation

129. See, for example, *In re Baby M*, a famous Supreme Court of New Jersey decision of considerable length, based almost entirely on public policy considerations. 537 A.2d 1227 (N.J. 1988).

The main issue in *Baby M* was the legality of "surrogacy contracts": An infertile couple that wished to adopt a child entered a contract whereby they paid another woman to carry a child for them. The issue came before the court when the surrogate mother changed her mind about following through with the contract and the adoptive parents sued to enforce the contract.

The court held surrogacy contracts unenforceable, noting that the sale of babies violates public policy: "We invalidate the surrogacy contract because it conflicts with the . . . public policy of this State. While we recognize the depth of the yearning of infertile couples to have their own children, we find the payment of money to a 'surrogate' mother illegal, perhaps criminal, and potentially degrading to women." *Id.* at 1234.

130. Justice Wilcox begins his policy discussion of the crisis of deadbeat parentage: "Refusal to pay child support by so-called 'deadbeat parents' has fostered a crisis with devastating implications for our children." *State v. Oakley*, 629 N.W.2d 200, 203 (Wis. 2001). Justice Wilcox goes on to back this assertion with a discussion of the perils of single parenthood and the adverse effects on children, such as "poor health, behavioral problems, delinquency and low educational attainment," and child poverty in general. *Id.* at 204.

131. Justice Bradley, using words from the California case *People v. Pointer*, calls the condition "coercive of abortion." *Id.* at 219 (Bradley, J., dissenting) (quoting *People v. Pointer*, 199 Cal. Rptr. 357, 366 (Ct. App. 1984)). Bradley also notes the injustice of "allowing the right to procreate to be subjected to financial qualifications" and thus "imbu[ing] a fundamental liberty interest with a sliding scale of wealth." *Id.* (Bradley, J., dissenting)

Justice Sykes rejected the probation condition, calling it "a compulsory, state-sponsored, court-enforced financial test for future parenthood." *Id.* at 221 (Sykes, J., dissenting).

132. *Id.* at 216 (Bradley, J., dissenting).

condition, claiming that it “will prevent [Oakley] from adding victims if he continues to intentionally refuse to support his children.”¹³³ Were Oakley to violate his probation, however, the majority’s decision to allow the child’s birth to carry with it criminal sanctions poses serious policy problems from the new child’s perspective: First, partly due to the majority’s failure to impose a probation condition that would successfully rehabilitate Oakley, the future child would be another victim to its father’s refusal to support it financially. More importantly, the child would have an added stigma of being the very existence that sent its father to prison. Finally, the prison sentence falling on the father as a result of the new child’s birth would make it doubly impossible for the new child to gain financial assistance from him.

2. *Policy Problems for the Potential Mother.*—In addition to the policy issues raised from the prospective child’s perspective, the prohibition of procreation as a probation condition also raises policy concerns for the potential mother.¹³⁴ Because this limitation of procreation is conditioned upon the birth of an infant, rather than conception,¹³⁵ a defendant like Oakley is able to escape probation violation as long as he insures that the child is not born. This mode of escape presents two possible dangers for potential mothers.

The first danger for potential mothers is that of coerced abortion.¹³⁶ First, a woman who has become impregnated by a probationer with this probation term could pressure herself into obtaining an abortion that she would not otherwise have obtained. There is a strong possibility that she would feel enough affinity with the father that she would not want to send him to prison, and additionally, the knowledge that if she did keep the child she would be forced to raise it alone could provide further incentive to terminate the pregnancy.

Aside from the woman’s potential inner-conflicts, this probation condition creates a likelihood of outside coercion from the father. Not wanting to go to prison, the father whose future is at stake would likely attempt to convince the woman carrying his child to obtain an abortion, through emotional or possibly physical means.

Secondly, the probation condition provides increased incentive for such a father to physically abuse the mother so that her agreement to obtain an abortion

133. *Id.* at 213.

134. The possibility of coerced abortion is raised by Justice Bradley, many other courts evaluating prohibition of procreation as a probation condition, and other commentators of *Oakley*. See, e.g., *State v. Mosburg*, 768 P.2d 313 (Kan. Ct. App. 1989) and *People v. Pointer*, 199 Cal. Rptr. 357, 366 (Ct. App. 1984).

135. I do not, in this observation, suggest that the appropriate condition be that Oakley is prohibited from *conceiving* a child. Such a condition would prove even more unworkable than the condition prohibiting pregnancy since Oakley’s probation officer would have little ability to determine whether Oakley violated probation by impregnating a woman. In noting the problem that conditioning probation on *birth* of a child creates, I merely explore why the specific condition in *Oakley* is unworkable. I remain true to my contention of the impropriety of a condition prohibiting procreation generally in this context.

136. See *supra* note 134.

no longer becomes necessary.¹³⁷ Such physical abuse could lead to the extreme physical and mental suffering on the potential mother's behalf, not to mention the possibility of her own fatality.

VI. THE SOLUTION: ALTERNATIVE WAYS TO DEAL WITH DEFENDANTS LIKE OAKLEY AND OTHER DEADBEAT PARENTS

As mentioned in the dissents of Justices Bradley and Sykes, the probation condition upheld by the majority is not the least intrusive means of accomplishing the goals of probation. Satisfactory probation conditions would promote public safety by addressing the problem Oakley has created for his present children and promote rehabilitation of Oakley by crafting terms that will make him into a more supportive father. Thus, a reactive *and* proactive solution is required, rather than the mere proactive solution offered by the majority of *Oakley* in its blanket ban on his procreative rights.

An alternative probation condition, as suggested by Justices Bradley and Sykes,¹³⁸ would allow Oakley to remain on probation, free from prison time, as long as he gains employment and has a significant portion of his wages garnished for the payment of child support. This solution not only requires the father to cease the criminal conduct of failing to pay support, but also solves the major problem his criminality caused—lack of financial support for the existing children.

In making this suggested alternative, it is necessary to recognize its weaknesses. Especially in the wake of a drained economy and resultant shortage of jobs, a defendant like Oakley could argue that he is unable to obtain

137. Recent studies on domestic violence already link pregnancy with higher abuse rates of women. Sandra L. Martin, Ph.D. et al., *Physical Abuse of Women Before, During, and After Pregnancy*, JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION, Mar. 28, 2001, at 1581-84.

A report published by the American Academy of Pediatrics noted this trend: "pregnancy has been associated with a higher risk of women being abused and injured." Robert M. Siegel, M.D. et al., *Screening for Domestic Violence in the Community Pediatric Setting*, PEDIATRICS 1999, Oct., 1999, at 874-77.

An article outside the medical realm cited another study from the JOURNAL OF AMERICAN MEDICAL ASSOCIATION that took place in Maryland in 2001. That study focused on the sharply increased rate of homicide among pregnant women, as compared with nonpregnant women. The author noted that from 1993 to 1998 homicide was the leading killer among pregnant women while it was the fifth leading killer among nonpregnant women. This severe disparity between the safety of pregnant women and nonpregnant women was tied to the increased likelihood of domestic violence towards women. Sarah Ramsay, *Study Uncovers 'Disturbing' Level of Pregnancy-Associated Homicide*, LANCET, Mar. 31, 2001, at 357.

If homicide and abuse rates already sharply increase as a result of the victim's possibly unwanted pregnancy, a probation condition like *Oakley's*, that carries the additional burden of a prison sentence with the birth of a child, could even further encourage increased rates in domestic violence toward pregnant women.

138. See *supra* note 123.

employment. The probationer should not be imprisoned after a good-faith effort and resultant failure to obtain gainful employment. This evaluation of the probationer's efforts in attempting to gain employment should be performed by the probation officer after sustained contact of the probationer and reasonable investigation of his job search.

If Oakley fails to gain employment, or the court, in its initial judgment of Oakley, determines that he will respond more effectively to prison-time, an alternative to probation would be to send Oakley to jail with a work-release provision that allows him to earn money that would go strictly toward payment of his child support arrears. This solution could be criticized since it requires taxpayers to pay for the cost of Oakley's upkeep while he earns money for his children's support, but is a satisfactory trade-off considering the unconstitutional and ineffective alternative imposed by the majority of *Oakley*.

While no solution to a societal crisis like deadbeat parentage can be a perfect one, a complete prohibition of procreation is not the answer. More satisfactory conditions like wage garnishment or prison work-release avoid the pitfalls of the constitutional and practical problems presented by the condition in *Oakley* since they address the existing problem the criminal conduct caused and further promote the rehabilitation of the probationer. These more responsive conditions thus constitute more reasonable alternatives than the proactive attempt to unconstitutionally restrict the probationer's constitutional freedoms by banning him from procreating.

TOP LEVEL DOMAIN REORGANIZATION: A CONSTITUTIONAL SOLUTION TO LEGISLATIVE ATTEMPTS AT INTERNET REGULATION

DAVID E. ROBERTS*

INTRODUCTION

The human mind seeks order. It craves categorization and structure in anticipation of productivity and efficiency. When questioned, most would characterize themselves as logical in nature, because the trait implies an organized approach to life. When there is some semblance of order, we can anticipate and plan for events, and we enjoy some sense of control. The way in which we coordinate the placement of buildings, homes, and factories reflects this desire for order. In nearly every urban area in America, zoning ordinances have been developed to arrange the landscape of towns and cities in an effort to avert chaotic scenarios of intermixed industrial, commercial, residential, and governmental areas.¹ Originally, the theory for zoning was developed to combat the harmful effects of disorganized urban growth during and after the Industrial Revolution, which were previously assuaged only by nuisance law.² The random placement of homes, factories, banks, post offices, bars, clubs, and billboards would hardly be tolerated by modern American society in the physical realm, yet it appears to be the accepted *modus operandi* of the Internet.

As the result of a complacent attitude toward organizing the astounding growth of the Internet, the online community has created many difficult questions regarding the freedom of speech and explicit material. Assuming the government has a legitimate interest in keeping pornographic material out of the hands of children,³ how can this be accomplished without impinging on the rights of adults seeking this material on the Internet? Is it possible to prevent unwanted pornography from disrupting the navigation of the Internet by adults? What solutions can be developed that would uphold current First Amendment principles of free speech? Is it possible to embrace a solution that is dependant on geographic community standards? How can the Internet be organized to yield greater efficiency for all users, more protection for types of property rights, and still promote its overall growth?

While the answers to all these questions clearly lie beyond the scope of any single work, this Note will focus on the conflict between the state interest in

* J.D. Candidate, 2003, Indiana University of Law—Indianapolis; B.S., 1998, Lehigh University, Bethlehem, Pennsylvania. I would like to express my gratitude to Patrick Poole and Scott Bergthold for their inspiration and advice regarding this Note's development. Also, I would like to thank my parents for their exemplary reflection of God's unconditional love and grace in their lives.

1. See JESSIE DUKEMINIER & JAMES E. KRIER, PROPERTY 942 (4th ed. 1998).

2. *Id.*

3. See *Reno v. ACLU*, 521 U.S. 844, 875 (1997) (*Reno II*); *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978) (citing *Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968)).

regulating types of sexually-oriented material⁴ and the individual's purported right to freely engage in and receive such speech.⁵ Congress has made two attempts to address these oft-opposing interests, primarily in response to public concern over the proliferation of sexually-oriented material on the Internet and children's free access to this material.⁶ The first of these attempts, the Communications Decency Act of 1996 (CDA),⁷ was found to be unconstitutionally vague by the U.S. Supreme Court in *Reno v. ACLU*.⁸ The second attempted regulation, the Child Online Protection Act (COPA),⁹ was also found to be unconstitutional by the U.S. District Court for the Eastern District of Pennsylvania, which granted a preliminary injunction against the enforcement of the statute.¹⁰

While the federal courts have ruled in favor of those entities opposing government regulation of the Internet's content thus far, purveyors of speech on the Internet should take some form of action to self-regulate. The motivation to self-regulate should be based in part on the notion that those entrenched in the Internet will be far more adept at developing workable standards for their own technology. More importantly, self-regulation is likely to curtail any future attempts of governmental intervention.¹¹

Opponents of Internet regulation should note that if they do not take action to self-regulate, it appears as if Congress will make further attempts to regulate Internet content. With each federal court decision providing further insight into

4. As developed throughout this Note, this type of material has been referred to by courts and legislatures, depending on the nature of the material and the question at hand, in legal terms of art including: "obscene," "indecent," "harmful to minors," and "patently offensive."

5. See Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 HASTINGS CONST. L.Q. 85, 85 (1991) (pointing out the Court's interest in the rights of both the speaker and potential listeners in the free speech analytical context).

6. Symposium, *Policing Obscenity and Pornography in an Online World*, 8 WM. & MARY BILL OF RTS. J. 693, 710 (2000) [hereinafter *Policing Obscenity*] (panel comments by Jonathan Zittrain).

7. Pub. L. No. 104-104, 110 Stat. 56, 133-43 (codified as amended in scattered sections of 47 U.S.C.).

8. 521 U.S. 844 (1997).

9. Pub. L. No. 105-277, 112 Stat. 2681 (codified at 47 U.S.C. §§ 230-31 (1994 & Supp. V 1999)).

10. *ACLU v. Reno*, 31 F. Supp. 2d 473 (E.D. Pa. 1999), *aff'd*, 217 F.3d 162 (3rd Cir. 2000), *cert. granted sub nom.*, *Ashcroft v. ACLU*, 532 U.S. 1037 (2001). The petitioner has changed from "Reno" to "Ashcroft" because of the appointment of John Ashcroft as Attorney General by President George W. Bush. The Supreme Court heard oral arguments for *Ashcroft* on November 28, 2001. E-mail from Bruce Taylor, President and Chief Counsel, National Law Center for Children and Families, to David E. Roberts (Oct. 3, 2001, 13:14:31 EST) [hereinafter Taylor E-mail] (on file with author).

11. Andy Patrizio, *XXX Domains May Be Hard Sell*, WIRED NEWS (Mar. 6, 2000), at <http://www.wired.com/news/business/0,1367,42217,00.html>.

how this can be done,¹² it seems that it is merely a question of semantics and timing before Congress formulates a constitutionally valid statute regulating Internet content. Generally, Congress can regulate speech if it is obscene, because this type of speech does not fall within the ambit of the First Amendment right to free speech. When determining whether speech is obscene, courts are roughly governed by the Supreme Court's ruling in *Miller v. California*.¹³ The three-prong obscenity test from *Miller*¹⁴ is vital to an analysis of speech on the Internet because it represents the product of the Supreme Court's attempt to balance freedom of speech against speech that is wholly unworthy of First Amendment protection.¹⁵ Using this test, and the refining influence of federal court opinions, Congress is likely to continue its pursuit of a constitutional regulation for the Internet.

Generally, there are many serious concerns over the way the Internet's content is currently structured. Whether the solutions come in the form of governmental or private regulation, there should be an urgency to act, as the Internet becomes more unwieldy with each passing day. Regulation of the content of the Internet is a reality that needs to be addressed quickly.¹⁶ Society cannot effectively concede that the Internet is beyond control and retreat from this apparently arduous task.¹⁷ With the adequate technology and political support available, the Internet is ripe for reform, as the potential benefits of a more streamlined, organized Internet outweigh the usefulness of a meaningless pool of data and random thoughts.

The reigning disorder of the Internet is largely a result of the misguided attempt to develop a wholly new legal discipline specific to this developing technology, cyberlaw, instead of applying established principles drawn from mature case law.¹⁸ Part I of this Note discusses the history and current state of the Supreme Court's First Amendment free speech doctrine regarding sexually explicit material. Part II of this Note presents the history and functionality of the Internet, as well as the governmental interests associated with the Internet's organization. Part III of this Note examines the Supreme Court's response to the two congressional attempts to regulate the content of the Internet within this free

12. See, e.g., *Reno II*, 521 U.S. at 872-81.

13. 413 U.S. 15 (1973).

14. *Id.* at 24.

15. See Jason Kipness, *Revisiting Miller After the Striking of the Communications Decency Act: A Proposed Set of Internet Specific Regulations for Pornography on the Information Superhighway*, 14 SANTA CLARA COMPUTER & HIGH TECH. L.J. 391, 405 (1998).

16. *Regulating the Internet: Should Pornography Get a Free Ride on the Information Superhighway?*, A Panel Discussion (Nov. 8, 1995), in 14 CARDOZO ARTS & ENT. L.J. 343, 360 (1996) [hereinafter *Regulating the Internet*] (panel comments of Barbara Bennett Woodhouse).

17. *Id.*

18. Joseph H. Sommer, *Against Cyberlaw*, 15 BERKELEY TECH. L.J. 1145 (2000). But cf. *Regulating the Internet*, *supra* note 16, at 360 (arguing that it is impractical to expect existing laws to be taken from one context and expect them to function in a new context).

speech framework: the CDA and COPA.¹⁹

Part IV proposes a different perspective for dealing with the massive amount of Internet content, which will center on the distinction between regulation and organization of speech. Also, Part IV proposes the solution of creating new top level domains (TLDs) as a method of categorizing the Internet's content. Furthermore, Part IV explores not only why a privately-created commission with administrative power to oversee the Internet's organization is preferred, but also why Congress would not be acting unconstitutionally by reclaiming its organizational power from the Internet Corporation for Assigned Names and Numbers (ICANN) and reordering the Internet itself.²⁰ Finally, Part V of this Note analyzes the strengths, weaknesses, and logistical difficulties of implementing such a system.

I. THE FREE SPEECH DOCTRINE AND LEVELS OF PROTECTED SPEECH

The text of the U.S. Constitution itself is the appropriate beginning to a discussion of First Amendment rights reserved to the citizenry. In relevant part, the Constitution states, "Congress shall make no law . . . abridging the freedom of speech, or of the press."²¹ This statement has been the subject of much interpretation throughout the history of American jurisprudence and politics, with a few notable exceptions to this seemingly categorical proclamation developing since 1789.²² By carving out narrow exceptions to this legal maxim, the Supreme Court has asserted that legislation regulating the content of speech does not necessarily violate the citizens' First Amendment rights.²³ Justice Holmes initially presented this notion in *Shenk v. United States*,²⁴ by promoting an analysis of speech regulations in consideration of the content and the context of the speech.²⁵

In its analysis of the content of speech, the Supreme Court has recognized Congress' authority to regulate adult access to material that is considered obscene.²⁶ However, the accepted proposition that obscene material does not

19. Pub. L. No. 104-104, 110 Stat. 56, 133-43 (codified as amended in scattered sections of 47 U.S.C.); Pub. L. No. 105-277, 112 Stat. 2681 (codified at 47 U.S.C. §§ 230-31 (1994 & Supp. V 1999)).

20. Declan McCullagh & Ryan Sager, *Getting to Domain Argument*, WIRED NEWS (Feb. 8, 2001), at <http://www.wired.com/news/politics/0,1283,41683,00.html>.

21. U.S. CONST. amend. I.

22. See *Ashcroft v. ACLU*, 535 U.S. 564, 573-74 (2002); *infra* notes 25-37 and accompanying text.

23. See *FCC v. Pacifica Found.*, 438 U.S. 726, 744 (1978).

24. 249 U.S. 47 (1919).

25. "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Id.* at 52.

26. See *Miller v. California*, 413 U.S. 15, 23 (1973); *Roth v. United States*, 354 U.S. 476 (1957).

enjoy First Amendment protection has not yet produced an agreeable standard by which to judge what defines obscenity.²⁷ Publicly, perhaps the most familiar and meaningful statement regarding obscenity was Justice Stewart's declaration: "I know it when I see it."²⁸ This assertion leaves much to be developed, as this rule of law is the antithesis of an objective standard for unprotected speech; and it leaves the citizenry without a meaningful guide as to the limits of its First Amendment protection.

There is a rebuttable presumption that pornography is a form of expression protected by the First Amendment, and that only pornography properly classified as obscene can be regulated.²⁹ As a matter of law child pornography is unprotected speech *per se*.³⁰ As such, there is no Supreme Court-developed standard for obscenity that needs to be applied to regulate this material.³¹ However, the Supreme Court has distinguished obscenity and child pornography from First Amendment-protected indecent speech.³² Since obscene speech has partly been defined as that which lacks "serious literary, artistic, political, or scientific expression,"³³ indecent speech presumably includes sexually-oriented material possessing one or more of these traits,³⁴ thereby invoking the protection of the First Amendment.

However, despite this protection, the Supreme Court has determined that in justifiable circumstances, indecent speech can be regulated. Such circumstances require that the government promote a compelling state interest³⁵ and do so by using the least restrictive means available.³⁶ These indicia of constitutionality conform to the strict scrutiny standard of review that the Supreme Court has used in its review of speech regulations, in light of the critical importance of the First Amendment.³⁷ In sum, the government can freely regulate obscene speech and child pornography. Further, the government may regulate indecent speech, so long as a compelling state interest is being furthered via the least restrictive

27. See Carlin Meyer, *Reclaiming Sex from the Pornographers: Cybersexual Possibilities*, 83 GEO. L.J. 1969, 1980 (1995) (pointing to the Court's debates concerning the "standards for judging" obscenity, not the existence of obscene speech, as evidence that an obscenity niche within the broad category of speech is judicially recognized).

28. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

29. See *Roth*, 354 U.S. at 484-88.

30. See *New York v. Ferber*, 458 U.S. 747 (1982) (stating that child pornography, like obscene speech, is outside the protection of the First Amendment).

31. See *id.* at 760-61.

32. See *Butler v. Michigan*, 352 U.S. 380 (1957).

33. *Miller v. California*, 413 U.S. 15, 23 (1973).

34. See *ACLU v. Reno*, 929 F. Supp. 824, 863 (E.D. Pa. 1996) (*Reno I*), *aff'd*, 521 U.S. 844 (1997). "*Obscenity* is that which is offensive to chastity. *Indecency* is often used with the same meaning, but may also include anything which is outrageously disgusting." ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 471 (3d ed. 1982).

35. See *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

36. See *Reno II*, 521 U.S. 844, 876 (1997).

37. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

means. These standards have been developed in the brick and mortar realm, and now must be applied to any regulation of the Internet.³⁸

A. Content-based Limitations on Free Speech

A more developed history of limitations on free speech is prudent as a precursor to delving into issues concerning the Internet and Congressional attempts to regulate its content. Legislative attempts to regulate speech fall within one of two broad categories: content-based and content-neutral regulations. Content-based regulations are subject to greater scrutiny than those that are content-neutral because of their focus on the speech itself.³⁹ However, consistent with the previously cited case law, legislative regulation of obscenity does not violate the First Amendment since it is a form of speech unworthy of such lofty protection.⁴⁰

The Supreme Court first developed a general rule for its First Amendment doctrine regarding obscenity in 1957 in *Roth v. United States*.⁴¹ The Court ruled that the statute in that case was not violative of any rights to free speech⁴² because the purpose of the First Amendment was to preserve discourse over political and social ideas.⁴³ Obscenity was found to be "of such slight social value . . . that any benefit that may be derived from [obscene expressions] is clearly outweighed by the social interest in order and morality."⁴⁴ The Court sought to provide a standard by which to evaluate potentially obscene material.⁴⁵ The Court proceeded to define obscenity subjectively, stating that material is obscene when in the opinion of "the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."⁴⁶

In *Miller v. California*,⁴⁷ the Supreme Court further developed *Roth's* seminal articulation of the obscenity doctrine. A majority opinion was reached

38. Even opponents of Congressional regulatory attempts express their desire to be held to the application of existing First Amendment doctrine. *Regulating the Internet*, *supra* note 16, at 385 (Panel comments of Nadine Strossen, President, ACLU).

39. See *Burson v. Freeman*, 504 U.S. 191, 198 (1992); *Ward v. Rock Against Racism*, 491 U.S. 781, 800 n.6 (1989).

40. See Bruce A. Taylor, *Hard-Core Pornography: A Proposal for a Per Se Rule*, 21 U. MICH. J.L. REFORM 255, 255 (citing *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705 (1986); *Miller v. California*, 413 U.S. 15, 23 (1973); *Roth v. United States*, 354 U.S. 476, 484-86 (1957); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)).

41. 354 U.S. 476 (1957).

42. See *id.* at 485.

43. *Id.* at 484.

44. *Id.* at 485.

45. *Id.* at 487.

46. *Id.* at 489. The Court defined its use of "prurient" as "lascivious desire or thought." *Id.* at 487 n.20.

47. 413 U.S. 15 (1973).

in the case, with agreement on a three-prong standard to aid courts in determining the constitutionality of a government regulation on purportedly obscene speech.⁴⁸ Specifically, the reviewing court must consider:

- (a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest;
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.⁴⁹

Further, the Supreme Court later reasoned that the three prongs of the *Miller* test act cohesively to define the boundaries of the “uncertain sweep of the obscenity definition.”⁵⁰ In 1977, the Court addressed the second prong of the test, stating that the determination therein was to be made by the average person applying community standards.⁵¹ Additionally, the Court later determined that the third prong’s determination was to be made using the familiar legal standard of the “reasonable person,”⁵² doing away with the community standards consideration for this prong.⁵³ Therefore, the modern doctrine of obscenity, as articulated in *Miller* and its progeny, provides that the government can prohibit such speech from distribution without violating the First Amendment.⁵⁴

B. Content-Neutral Regulation of Speech

Apart from the state’s interest in subjective notions of morality and decency, the state can regulate speech if it does so in furtherance or protection of other vital state interests. Specifically, the Court has found that commercial sexually-oriented speech endangers government interests in crime prevention, property valuation, and quality of urban life.⁵⁵ When focusing on the preservation of these interests the appropriate question is no longer whether the speech is constitutionally protected, which renders the standard of strict scrutiny inapplicable. Since this type of regulation is not concerned with the constitutionality of the speech’s content, these legislative acts have been referred to as content-neutral regulations.⁵⁶

One notable application of a content-neutral regulation to a sexually-oriented

48. *Id.* at 24.

49. *Id.* (citations omitted).

50. *Reno II*, 521 U.S. 844, 873 (1997).

51. *Smith v. United States*, 431 U.S. 291, 300-01 (1977).

52. *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987).

53. *Id.* at 501 n.3.

54. *Miller*, 413 U.S. at 20.

55. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986).

56. *Id.*

business is the case of *Renton v. Playtime Theatres, Inc.*⁵⁷ In that case, the city of Renton, Washington enacted legislation regulating the time, place, and manner of operation for sexually-oriented businesses in its town based on studies conducted in numerous cities, including near-by Seattle.⁵⁸ These studies showed decreasing property values and increasing crime rates in areas neighboring such businesses.⁵⁹ Citing these deleterious secondary effects that the businesses had on the community, the city was able to regulate speech without questioning the content of the movies shown in the adult theater. The issue did not center on whether the movies were obscene, and therefore unprotected from regulation under the free speech doctrine; rather, the inquiry concerned the effects of such businesses on the peace and welfare of the community.⁶⁰ The Supreme Court later reasoned that there was no need for studies to be conducted within the city in question, since the secondary effects had been established by convincing evidence elsewhere.⁶¹ To require such a practice would effectively harm the community by prohibiting preemptive measures from being taken against proven sources of harmful effects.

Additionally, the Supreme Court has not accepted the argument that targeting sexually-oriented businesses is a violation of the Equal Protection Clause.⁶² Sexually-oriented merchants have argued that municipalities violate this doctrine by focusing on the content of the films that are shown in their theaters, but this argument was soundly rejected.⁶³ Further, potential Equal Protection claims by sexually-oriented businesses based on the assertion that other entities also contribute to the deleterious secondary effects previously enumerated are likewise without merit. It is generally accepted that the Equal Protection doctrine permits legislative bodies to take a piecemeal approach to problems, recognizing the inherent difficulty in identifying all sources of a given mischief and respecting the desire to avoid overbreadth.⁶⁴

Therefore, the Supreme Court has held content-based regulations to the highest standard of scrutiny, demanding the furtherance of a compelling state interest via the least restrictive means available in order to pass constitutional muster. Alternatively, if the statute is aimed at curbing the deleterious secondary effects of sexually-oriented speech, the Court is likely to rule in favor of its constitutionality based on the compelling state interest in reducing levels of crime and preserving property values. Finally, the Court has not recognized an

57. 475 U.S. 41 (1986).

58. *Id.* at 43-44.

59. *Id.* at 50.

60. *Id.*

61. *Id.* at 50-52.

62. U.S. CONST. amend. XIV, § 1.

63. *See Renton*, 475 U.S. at 55 n.4 (citing *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 63-73 (1976)).

64. WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW 671-72 (10th ed. 1997) (citing Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949)).

Equal Protection argument in cases where only sexually-oriented businesses have been the subject of zoning ordinances.

II. HISTORY AND FUNCTIONALITY OF THE INTERNET

A. History and Growth

To truly grasp the difficulty in applying the developed notions of obscenity and free speech to the Internet, a brief account of the Internet's history and its pervasiveness is appropriate. Today's Internet can find its genesis in a military program began in 1969, which was designed to enable communication between computers operated by the military, defense contractors, and certain universities.⁶⁵ This seminal concept for a network of computers was then applied to create civilian networks for business and private use. Eventually, these individual networks were linked together to create a worldwide method of communication.⁶⁶ It is this "international network of interconnected computers" that is known as the Internet.⁶⁷

Over the past two decades, the Internet has undergone "extraordinary growth," increasing in size from 300 linked host computers in 1981 to approximately 9.4 million in 1996.⁶⁸ Data taken in July 2001 show that this number has ballooned to over 125 million host computers worldwide,⁶⁹ with over 165 million actual users with home access to the Internet in the United States *alone*.⁷⁰ These statistics confirm the perceived ubiquity of the Internet, implying that it is a medium of communication and a component of life entrenched in the global society.

B. Accessing the Internet

The millions of Internet users access the Internet utilizing one of two major methods: by using a computer directly linked to the Internet, or by using their personal computer to contact a remote computer that is directly linked to the Internet.⁷¹ Typically, computers directly linked to the Internet can be found at institutions such as universities, corporations, libraries, or government facilities.⁷² Remote contact can be accomplished via various methods, including a telephone

65. Reno II, 521 U.S. 844, 849-50 (1997).

66. *Id.* at 850.

67. *Id.* at 849.

68. *Id.* at 850.

69. Internet Software Consortium, *Internet Domain Survey, July 2001*, at <http://www.isc.org/ds/WWW-200107/index.html> (n.d.) (copy on file with author) (noting that there has been a change in how host computers are counted, and that an adjusted estimate of the number of host computers in 1996 is actually closer to 14.3 million).

70. Nielsen/NetRatings, *July Internet Universe*, at http://www.nielsennetratings.com/hot_of_the_net_i.htm (n.d.) (copy on file with author).

71. Reno I, 929 F. Supp. 824, 832 (E.D. Pa. 1996), *aff'd*, Reno II, 521 U.S. 844 (1997).

72. *Id.* at 832-33.

modem, a cable modem, or digital subscriber line (DSL).⁷³ There are also a small, but growing number of users that access the Internet by satellite connection.⁷⁴ When using one of these indirect methods of accessing the Internet, the user must utilize an Internet Service Provider (ISP).⁷⁵ ISPs are third-party entities with direct contact to the Internet who provide access to their computers, and often charge a usage fee.

Once connected to the Internet, there are various retrieval methods that allow the user to access information located on a remote computer, such as file transfer protocol, gopher, and the World Wide Web (Web).⁷⁶ Of these, the most widely used method of information retrieval and general communication over the Internet is the Web.⁷⁷ The popularity of the Web is largely attributable to the user's ability to access material and navigate between various information resources quickly. Most information on the Web is arranged such that text, images, sound, and video may be accessed without input of even the most basic computer commands.⁷⁸

Regardless of the manner in which one chooses to connect to the Internet, the preferred method of retrieving information, or the information and services utilized, the primary point of discussing Internet access—with regard to the future of Internet organization—is that a user must go through an intermediate entity to access the Internet. Although this may appear to be straightforward, it holds the key to potential organization or regulation of the Internet, as this intermediary essentially controls the information accessible to the end user.⁷⁹

C. Government Interest at Stake: Children's Access to Sexually-Oriented Material

With the allure of such a powerful communication, research, and commercial device, many have overlooked or minimized the distinct governmental and societal interests placed in jeopardy by an unchecked Internet. The articulation of such interests is vital, since in the absence of true concerns, "there is no point in agonizing over [their] solution."⁸⁰ Apart from concerns common to all users, such as decreased research efficiency and unsolicited contact by sexually-oriented websites, the government has an undeniable interest in protecting

73. Joe Froehlich, *Internet Bandwidth Technologies*, WINDOWS NT PROFESSIONAL (Sept. 2000), available at <http://msdn.microsoft.com/library/en-us/dnntpro00/html/wnp0095.asp> (copy on file with author).

74. *Id.*

75. *ACLU v. Reno*, 31 F. Supp. 2d 473, 482 (E.D. Pa. 1999) (*Reno III*), *aff'd*, 217 F.3d 162 (3rd Cir. 2000) (*Reno IV*), *cert. granted*, *Ashcroft v. ACLU*, 532 U.S. 1037 (2001).

76. *Reno I*, 929 F. Supp. at 835.

77. *Reno II*, 521 U.S. 844, 885 (1997).

78. *See Reno I*, 929 F. Supp. at 836.

79. Charles C. Mann, *Taming the Web*, TECH. REV. (Sept. 2001), available at <http://www.pbs.org/wgbh/pages/frontline/shows/porn/special/taming.html> (copy on file with author).

80. *Policing Obscenity*, *supra* note 6, at 699 (panel comments by Bruce Watson).

children from exposure to pornographic material.⁸¹ In large part this is based on a societal recognition of a healthy level of curiosity in children. As this curiosity naturally turns to sexual matters, society does not want pornography setting the ideals for sexual role models or interpersonal relationships.⁸² However, this interest must be counterbalanced with the right of adults to access speech protected by the First Amendment.⁸³ To limit adult access to material suitable only for children has been colorfully described as “burn[ing] the house to roast the pig.”⁸⁴

The Internet poses a difficult challenge to governmental bodies trying to balance these interests constitutionally. The Internet has been regarded as a great speech-enhancing medium that has produced more of every kind of speech, including pornography.⁸⁵ Further, the private nature of the Internet allows access to this pornography at much lower transactional cost.⁸⁶ However, in the course of lowering the barriers to accessing pornography, the Internet has not prohibited children from exercising this same level of freedom. Therefore, the government is faced with the challenge of promoting the free exchange of ideas via a medium that gives each user a virtual press, while simultaneously developing an effective barrier to material that is harmful to minors.

Children’s exposure to pornography on the Internet is further enhanced by the current method of information retrieval: search engines. Several search engines have been developed as an Internet service for seeking out Web pages that pertain to certain topics or contain key phrases.⁸⁷ After performing its search, a list of hyperlinks⁸⁸ is displayed that match the topic or phrase sought by the user.⁸⁹ However, search engines are not exact, and may accidentally return links to sexually explicit websites, despite an otherwise benign search.⁹⁰ If the problem were confined to the acceptable explanation of irrelevant search results,

81. See *Reno II*, 521 U.S. at 875; *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978) (citing *Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968)).

82. See *Policing Obscenity*, *supra* note 6, at 700 (panel comments by Bruce Watson).

83. E.g., *Reno II*, 521 U.S. at 875.

84. *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

85. See *Reno II*, 521 U.S. at 853-54.

86. See *Policing Obscenity*, *supra* note 6, at 709 (providing panel comments by Jonathan Zittrain).

87. See *Reno I*, 929 F. Supp. 824, 837 (E.D. Pa. 1996), *aff’d*, *Reno II*, 521 U.S. 844 (1997).

88. Hyperlinks enable a user to navigate throughout the Internet simply by moving a mouse pointer over the link and clicking on it, which then transfers the user to a new Internet address.

89. See *Reno I*, 929 F. Supp. at 837.

90. See *id.* at 844. Despite a demonstration showing the inaccuracy of search engines at the hearing, the court still concluded that exposure to sexually-oriented material rarely occurs in an accidental manner analogous to broadcasts. *Id.* at 844-45. By one account, the benign search for “Pokemon pictures” at one time returned a pornographic site as the first hyperlink. *Policing Obscenity*, *supra* note 6, at 699-700 (providing panel comments by Bruce Watson). Further, pornographic websites misuse brand names such as Disney, Nintendo, and Barbie to increase the occurrence of their hyperlink in Internet searches. *Id.*

the government and concerned citizens would have little reason to find fault with Internet pornographers. However, a study by an online research company showed that an estimated twenty-five percent of pornography sites embed popular name brands into the coding of their websites.⁹¹ This tactic yields search results to common search terms that are infiltrated by hyperlinks to their sites. Further, should an individual click on one of these hyperlinks, some pornographic sites have ingeniously programmed a loop that forces the user to another related site should they attempt to leave the site using the "back" button.⁹² It is precisely this type of deceptive luring and unprincipled entrapment that has raised the concern of many in society and government.

III. FEDERAL COURTS HAVE RULED CONGRESS' ATTEMPTS TO REGULATE INFORMATION ON THE INTERNET UNCONSTITUTIONAL

A. *The Communications Decency Act of 1996*

The first congressional attempt to regulate information on the Internet was the Communications Decency Act of 1996 (CDA).⁹³ The purpose of the CDA was to address growing concerns over children's access to sexually explicit material on the Internet.⁹⁴ To accomplish this goal, the CDA imposed criminal sanctions against any entity "knowingly" providing "obscene" or "indecent" communications to any person under the age of eighteen.⁹⁵ Further, the CDA prohibited communication of "patently offensive" material to any person under eighteen.⁹⁶ The reach of these two subsections was limited by two affirmative defense provisions,⁹⁷ which protected entities who had taken "good faith, reasonable, effective, and appropriate actions" to prevent accessibility by minors.⁹⁸

Two separate actions were quickly initiated to challenge the CDA's constitutionality, alleging that the terms "indecent" and "patently offensive" were

91. *Policing Obscenity*, *supra* note 6, at 699-700 (providing panel comments by Bruce Watson).

92. *Id.* at 700 (stating that without some sophisticated knowledge of Internet navigation, the average user is forced to turn off the computer to exit the website).

93. 47 U.S.C. § 223 (Supp. 1997). For an exhaustive review of the federal courts' analysis of the CDA, see, for example, J.V. Hale, C. *Reno v. American Civil Liberties Union: Supreme Court Strikes Down Portions of the Communications Decency Act of 1996 as Facially Overbroad in Violation of the First Amendment*, 24 J. CONTEMP. L. 111 (1998).

94. See 141 CONG. REC. S8088 (daily ed. June 9, 1995) (statement of Sen. J. James Exon, Jr. (D-SD)).

95. 47 U.S.C. § 223(a)(1) (Supp. 1997) (stating that providers of such communications "shall be fined under Title 18, or imprisoned not more than two years, or both").

96. *Id.* § 223(d) (subjecting providers to the same penalty as under § 223(a)(1)(B)).

97. *Id.* § 223(e)(5).

98. *Id.* § 223(e)(5)(A).

too broad and would violate the free speech clause of the First Amendment.⁹⁹ These cases were joined, and a special three-judge district court issued a preliminary injunction against the challenged provisions.¹⁰⁰

On appeal, the Supreme Court affirmed the lower court's ruling, stating that the CDA's terminology was without the requisite First Amendment precision for statutes attempting to regulate the content of speech.¹⁰¹ Writing for a seven-Justice majority, Justice Stevens stated that the statute was vague, that it would undoubtedly produce a chilling effect on Internet speech, and that it was not narrowly tailored to further the government interest in protecting children from sexually explicit speech.¹⁰²

Specifically, the Supreme Court rejected the government's attempt to draw favorable precedent from three cases where regulatory statutes were found constitutional. First, the Court distinguished *Ginsberg v. New York*,¹⁰³ stating that the challenged statute in that case employed much narrower language than that found in the CDA.¹⁰⁴ Next, the character of the communication that the CDA sought to regulate—all Internet transmissions—was contrasted with the scope of the Federal Communication Commission's (FCC) order in *FCC v. Pacifica Foundation*.¹⁰⁵ In *Pacifica*, the FCC was attempting to regulate transmissions via radio, which was characterized as the medium that has enjoyed the most limited First Amendment protection because of its accessibility by minors.¹⁰⁶ Finally, the Court refused to analogize the CDA with *City of Renton v. Playtime Theatres*.¹⁰⁷ The Court noted that the ordinance in *Renton* was specifically designed to combat the deleterious secondary effects of sexually explicit speech by regulating the time, place, and manner of operation, whereas "the CDA [was] a content-based blanket restriction on speech."¹⁰⁸

In the course of searching for appropriate precedent, the Supreme Court

99. *Reno II*, 521 U.S. 844, 861-62 (1997). Plaintiffs included the ACLU, National Writers Union, Planned Parenthood Federation of America, American Library Association, America Online, American Booksellers Association, Inc., Apple Computer, Association of American Publishers, CompuServe, Magazine Publishers of America, Microsoft Corp., and Newspaper Association of America. *Id.* at 862 nn.27 & 28.

100. This panel, created pursuant to § 561(a) of the Telecommunications Act of 1996, was comprised of one judge from the Third Circuit Court of Appeals and two judges from the Eastern District of Pennsylvania. *Reno I*, 929 F. Supp. 824, 825 (E.D. Pa. 1996), *aff'd*, *Reno II*, 521 U.S. 844 (1997).

101. *Reno I*, 929 F. Supp. at 874.

102. *Id.* at 874-78.

103. 390 U.S. 629 (1968).

104. *Reno II*, 521 U.S. at 865 (stating that the statute's regulation of material that was "utterly without redeeming social importance for minors" holds a narrower scope than the "indecent" and "patently offensive" language in the CDA).

105. 438 U.S. 726 (1978).

106. *Reno II*, 521 U.S. at 867.

107. 475 U.S. 41 (1986).

108. *Reno II*, 521 U.S. at 867-68.

likened the CDA to the statute prohibiting indecent and obscene interstate commercial telephone messages at issue in *Sable Communications of California, Inc. v. FCC*.¹⁰⁹ In that case, the Court determined that a ban on indecent commercial telephone messages was unconstitutional since, unlike a broadcast, the user cannot be "taken by surprise by an indecent message."¹¹⁰ The Court noted that similar to the affirmative steps required to access sexually-oriented prerecorded messages, Internet users must make affirmative steps to access sexually-oriented material.¹¹¹ The Court found this precedent persuasive, and ruled that the content-based nature of the regulation made the CDA an unconstitutional attempt to regulate speech.¹¹²

In a partial dissent, Justice O'Connor specifically addressed the issue of zoning on the Internet. She characterized the purpose of the CDA to be the creation of "adult zones" that would contain material deemed inappropriate for minors.¹¹³ After noting a history of states creating "adult zones" in numerous circumstances, Justice O'Connor asserted that the Court would uphold an Internet zoning plan "if (i) it does not unduly restrict adult access to the material; and (ii) minors have no First Amendment right to read or view the banned material."¹¹⁴ By articulating the requisite characteristics of any constitutional zoning ordinance, Justice O'Connor's dicta gave the broad, rigorous criteria for successfully organizing information on the Internet.

B. *The Child Online Protection Act*

In response to the Supreme Court's opinion on the CDA, Congress again sought to protect children from sexually-explicit material on the Internet by passing the Child Online Protection Act (COPA)¹¹⁵ in October 1998.¹¹⁶ As opposed to the vague terms of "indecent" and "patently offensive" utilized in the CDA, Congress prohibited the knowing communication of material that is "harmful to minors" for commercial purposes.¹¹⁷ Unlike the CDA, COPA proceeds to define the specific terms employed within the act, including the "harmful to minors" standard.¹¹⁸ That definition, with slight alterations so as to be applicable specifically to minor viewers, was comprised of the three-prong

109. 492 U.S. 115 (1989).

110. *Id.* at 128.

111. *Reno II*, 521 U.S. at 869.

112. *Id.* at 874-78.

113. *Id.* at 886 (O'Connor, J., concurring in part and dissenting in part).

114. *Id.* at 888 (O'Connor, J., concurring in part and dissenting in part).

115. 47 U.S.C. §§ 230-31 (2000). For an exhaustive review of the federal courts' analysis of COPA, see, for example, Heather L. Miller, *Strike Two: An Analysis of the Child Online Protection Act's Constitutional Failures*, 52 FED. COMM. L.J. 155.

116. *Reno III*, 31 F. Supp. 2d 473, 476-77 (E.D. Pa. 1999), *aff'd*, *Reno IV*, 217 F.3d 162 (3d Cir. 2000), *cert. granted*, *Ashcroft v. ACLU*, 532 U.S. 1037 (2001).

117. 47 U.S.C. § 231(a).

118. *Id.* § 231(e).

Miller test for obscene material.¹¹⁹ Further, the “harmful to minors” standard is not novel, as it has previously been explicitly approved by the Court¹²⁰ and is utilized in forty-three state statutes prohibiting the sale of harmful materials to minors.¹²¹ As with the CDA, violators of COPA are subject to criminal sanctions,¹²² though affirmative defenses are available for good faith efforts to restrict access by minors to such material.¹²³

Alleging that the “harmful to minors” standard was as vague as the standards from the CDA, COPA was immediately challenged by the original *Reno* plaintiffs the day after it was signed into law.¹²⁴ The district court granted a preliminary injunction against the application of COPA,¹²⁵ using a strict scrutiny standard to analyze the content-based regulation of speech.¹²⁶ The district court found that COPA did not employ the least restrictive means to accomplish the legitimate government interest in the welfare of children.¹²⁷

On appeal to the Third Circuit Court of Appeals,¹²⁸ the lower court’s preliminary injunction was affirmed.¹²⁹ The court of appeals noted that current technology did not allow Internet publishers to restrict access to their material based on the geographic location of each individual user.¹³⁰ The appellate court reasoned that this limitation requires publishers to meet the most conservative state’s community standards, since the modified *Miller* test that defines “harmful to minors” requires a determination of “contemporary community standards.”¹³¹ The court of appeals found that this burden, which was a direct result of the state of technology at the time of the ruling, was an impermissible restriction on Internet publishers’ protected First Amendment speech.¹³² Effectively, this holding was much narrower than the district court’s since the appellate court did not categorically refuse the applicability of a modified *Miller* test to the

119. *Id.*

120. *See, e.g.,* *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126-28 (1989); *Ginsberg v. New York*, 390 U.S. 629, 636-43 (1968).

121. *See, e.g.,* CAL. PENAL CODE § 313.1 (West 1999); FLA. STAT. ch. 847.012 (2000); 720 ILL. COMP. STAT. 5/11-21 (West 1993); IND. CODE ANN. § 35-49-3-3(1) (West 1998); N.Y. PENAL § 235.21(1) (McKinney 1999); 18 PA. CONST. STAT. § 5903(c) (2001); TEX. PENAL CODE ANN. § 43.24(b) (Vernon 1994).

122. 47 U.S.C. § 231(a) (stating that violators are potentially subject to a series of fines, up to six months imprisonment, or both).

123. *Id.* § 231(c).

124. *Reno III*, 31 F. Supp. 2d 473, 476 (E.D. Pa. 1999), *aff’d*, *Reno IV*, 217 F.3d 162 (3rd Cir. 2000), *cert. granted*, *Ashcroft v. ACLU*, 532 U.S. 1037 (2001).

125. *Id.* at 498-99.

126. *Id.* at 492-93.

127. *Id.* at 496-97.

128. *Reno IV*, 217 F.3d 162 (3rd Cir. 2000).

129. *Id.* at 180.

130. *Id.* at 166.

131. *Id.*

132. *Id.*

Internet.¹³³ In fact, the court iterated a “firm conviction that developing technology will soon render the ‘community standards’ challenge moot,” which would allow Congress to constitutionally draft a protective statute against material harmful to children.¹³⁴

The government subsequently appealed the Third Circuit’s ruling, to which the Supreme Court granted certiorari.¹³⁵ The Court’s ruling was announced in five narrowly drafted opinions, in which eight Justices voted to vacate the Third Circuit’s ruling and remand for further consideration.¹³⁶ Through Justice Thomas’ opinion, the Court held “only that COPA’s reliance on community standards to identify ‘material that is harmful to minors’ does not *by itself* render the statute substantially overbroad for purposes of the First Amendment.”¹³⁷ Justice Thomas noted that omitting a specific geographic reference does not do violence to the contemporary community standards analysis, per the Court’s ruling in *Jenkins v. Georgia*.¹³⁸ Such a generic reference would negate the Third Circuit’s concern that the Internet community would have to “abide by the ‘most puritan’ community’s standards.”¹³⁹ Even if geographic constraints are used, Justice Thomas also points out that “requiring a speaker disseminating material to a national audience to observe varying community standards does not violate the First Amendment.”¹⁴⁰ Although the Court rejected this narrow constitutional assault on COPA, the Court cited the prudence of having the Third Circuit initially review the other potential constitutional maladies,¹⁴¹ effectively delaying any ultimate ruling on COPA’s constitutionality by several years. Regrettably, such a time frame only enhances the difficulty of implementing COPA, should it pass constitutional muster in the final analysis.

C. Erroneous Focus on Analogous Fora in Judicial Review of the CDA and COPA

During the course of their constitutional analysis of the CDA and COPA, one of the primary focal points was the search for an appropriate analogy for Internet communication.¹⁴² The motivation for an analogy is clearly driven by the notion

133. *Id.* at 180.

134. *Id.* at 181.

135. *Ashcroft v. ACLU*, 532 U.S. 1037 (2001).

136. *Ashcroft v. ACLU*, 535 U.S. 564, 586 (2002) (the government remains enjoined from enforcing COPA until after the Third Circuit reviews the remaining “difficult issues”). *Id.*

137. *Id.* at 585 (emphasis in original). Further, the Court withheld any opinion regarding other potential constitutional concerns, including alternative bases for overbreadth, vagueness, or COPA’s ability to ultimately withstand a strict scrutiny analysis. *Id.*

138. *Id.* at 576-77 (citing *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974)).

139. *Id.* at 577.

140. *Id.* at 580 (referring to the Court’s holding in *Hamling v. United States*, 418 U.S. 87 (1974)).

141. *Id.* at 585.

142. See, e.g., *Reno III*, 31 F. Supp. 2d 473 (E.D. Pa. 1999), *aff’d*, *Reno IV*, 217 F.3d 162 (3d

that once the Internet is appropriately likened to an existing mode of communication, the regulation on speech permitted by the Supreme Court for that forum can then be applied to the Internet.¹⁴³ The federal courts have considered analogies to communication via broadcast, print publishers, telephone, cable television, and postal delivery,¹⁴⁴ with none truly capturing the unique combination of functions served by the Internet. One reaction to the inadequacy of an existing analogy—combined with the concern over applying the *Miller* test to the Internet—has been to call for the abolition of the obscenity standard altogether.¹⁴⁵ This extreme stance is but the natural extension of an analysis focused on the trees without a clear vision of the forest.

Contrary to the oft-recited notion that the scope of speech protected by the First Amendment is dependent on the specific technology of the distinct forum in which it exists, some legal commentators have noted that First Amendment protection is uniform across all media, with an exception for broadcast communications.¹⁴⁶ Upon agreement that the Internet does not properly fit into this broadcast exception,¹⁴⁷ it is only proper to apply the traditionally accepted standard for the scope of protected speech: the *Miller* test.¹⁴⁸ Therefore, the challenge lying ahead is to develop a constitutional balance between the existing

Cir. 2000), *cert. granted*, *Ashcroft v. ACLU*, 532 U.S. 1037 (2001); *Reno II*, 521 U.S. 844 (1997). This analysis stems from the notion that proper First Amendment analysis requires a court to examine the content and context in which the speech occurred. *See Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 740-41 (1996); *FCC v. Pacifica Found.*, 438 U.S. 726, 744 (1978).

143. Congress applied existing standards when drafting both the CDA and COPA. The “indecent” speech standard in the CDA was borrowed from the standard for broadcast speech. This standard is appropriate for broadcasts because they enter the private sphere of the user unbidden and are highly accessible to children. *Pacifica Found.*, 438 at 748-50. In reply to the Court’s ruling on the CDA, Congress utilized the much lower “harmful to minors” standard applied to print media and telephone communications. *See Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989); *Ginsberg v. New York*, 390 U.S. 629 (1968); *see also Policing Obscenity*, *supra* note 6, at 700-01, 706 (providing panel comments by Bruce Watson and Bruce Taylor).

144. *See, e.g., Reno II*, 521 U.S. at 864-68.

145. *See Kipness*, *supra* note 15, at 419-20. This would be based on an expansion of the dicta from *Stanley v. Georgia*, 394 U.S. 557 (1969).

146. *See Regulating the Internet*, *supra* note 16, at 376-77 (providing a response by Mike Godwin to audience question).

147. *See Reno II*, 521 U.S. at 868-70.

148. “While new technology such as the Internet may complicate analysis and may sometimes require new or modified laws, it does not . . . change the analysis . . . under the First Amendment.” *United States v. Baker*, 890 F. Supp. 1375, 1390 (E.D. Mich. 1995) (footnotes omitted). Application of the existing free speech doctrine, presumably including its limitations, has even been supported by the ACLU. *Regulating the Internet*, *supra* note 16, at 385 (providing panel comments of Nadine Strossen, President, ACLU). However, ACLU publications suggest their deeper goal is to change the standard of obscenity itself. *See Policing Obscenity*, *supra* note 6, at 700-01 (providing panel comments by Bruce Watson).

Miller test for obscenity, the government's interest in protecting minors from material that is harmful to them, and the right of adults to access material that is constitutionally protected under the free speech doctrine.

IV. LOOKING AHEAD: GOVERNMENT VS. PRIVATE ACTION REGARDING THE INTERNET

A. Organization vs. Regulation

One of the downfalls with Congress' approach to managing the Internet's content is that they have focused primarily on creating constitutional regulations of free speech.¹⁴⁹ To effectively further the state interest in protecting children from sexually-oriented material, authoritative bodies should instead focus on methods of *organization* as opposed to traditional *regulation*. The term "organization" has been purposefully chosen over the traditional term "zoning" because of the notions of zoning articulated by Justice O'Connor.¹⁵⁰ Zoning has been said to have two critical characteristics that allow for restricting access by children, yet permitting adults' access to the same material: geography and identity.¹⁵¹ These characteristics refer to the ability of merchants to visually examine the potential consumer and request specific information to ensure the viewer is of an appropriate age.¹⁵²

However, applying this narrow notion of zoning to the Internet restricts analysis to the end user. Organization, conversely, refers to compartmentalizing the entirety of the Internet's content, thereby providing general assistance to the user in identifying material. Therefore, by design, organization of information is a way of increasing the usefulness of that which is being ordered. Once properly labeled, an individual or other entity can then choose to privately regulate what type of information will be accessible on their personal computer.

The Internet's privacy serves to assuage typical concerns regarding the impact of zoning on the commercial viability of a targeted merchant. Loss of clientele and social stigmatization have been two charges of the deleterious effects zoning may have on merchants that are labeled as "pornographers," but these concerns do not transfer strictly to the Internet. Clientele are not dissuaded from visiting pornography sites on the Internet by notions of shame of recognition or fear of physical harm. Further, the structure of the Internet diminishes the level of stigmatization against the merchant since it is impossible to relegate a pornographer to a seedy, vile neighborhood, which may be the effect of some zoning ordinances. Therefore, the proposed organization of material on the Internet is more analogous to the organization of information in libraries according to the Dewey Decimal system than to physical zoning ordinances. In

149. See *Reno III*, 31 F. Supp. 2d 473 (E.D. Pa. 1999), *aff'd*, *Reno IV*, 217 F.3d 162 (3d Cir. 2000), *cert. granted*, *Ashcroft v. ACLU*, 532 U.S. 1037 (2001); *Reno II*, 521 U.S. at 868.

150. *Reno II*, 521 U.S. at 888-90 (O'Connor, J., concurring in part, dissenting in part).

151. *Id.*

152. *Id.*

an organized structure, speech is not impinged; it is merely placed in a useful, accessible locale.

B. Government-based Organization of the Internet

Two primary questions gird the possibility of government organization of the Internet. Does the government still have the power to organize the Internet, in light of Congress' act granting ICANN authority to make Internet policy decisions?¹⁵³ Can the government take action to organize the Internet's content without creating constitutional concerns similar to those arising from their regulation attempts?

1. *The Government Still Has the Authority to Organize the Internet.*—In lieu of regulation, the government still retains the authority to affect the structure of the Internet. ICANN is a private organization that was empowered via Congressional act to manage TLDs and oversee the Internet's organization.¹⁵⁴ However, Congress' General Accounting Office has reported that it is the Commerce Department, not ICANN, which retains the ultimate authority over TLD management.¹⁵⁵ In response to recent ICANN action, some Internet entities have specifically called for government intervention into the issue of policy-making on the Internet because the interests of ICANN are not representative of the interests of users.¹⁵⁶ Therefore, the government retains the final decision-making authority regarding the organization of the Internet and appears to enjoy some support from the online community.

2. *Organization Relieves the Constitutional Concerns for Government Regulatory Actions.*—Organization of the Internet can be accomplished constitutionally, so long as the government works within the bounds of First Amendment free speech principles. Above all other rights put at risk by the Internet, this right is of foremost concern because of the unique opportunity for the masses to have their individual voices heard as never before.¹⁵⁷ The impact of the Internet is profound because it enables each person with Internet access to own a press,¹⁵⁸ representing an extremely low barrier to entrance for potential speakers.¹⁵⁹

One primary challenge for the government is to address the applicability of obscenity standards to the Internet. The main problem associated with the *Miller* test's applicability to the Internet is its reliance on current local community

153. McCullagh & Sager, *supra* note 20.

154. Declan McCullagh, *Senator Seeks Sex*, WIRED NEWS, June 9, 2000, at <http://www.wired.com/news/politics/0,1283,36867,00.html>.

155. McCullagh & Sager, *supra* note 20.

156. *Id.*

157. *Regulating the Internet*, *supra* note 16, at 344 (providing the introductory comments of Frank J. Macchiarola).

158. *United States v. Baker*, 890 F. Supp. 1375, 1390 (E.D. Mich. 1995) (analogizing the Internet with a newspaper).

159. *Reno II*, 521 U.S. 844, 863 n.30 (1997).

standards of decency or morality.¹⁶⁰ By representing a global community, this standard is difficult, if not impossible, to apply to the Internet's content.¹⁶¹ Should one accept the notion that global standards of decency and morality should govern the definition of obscenity, the legal force of the *Miller* test is obliterated. While this concern for a meaningful obscenity standard lurks for future scholars to address, the principle that the government can organize the Internet according to the accepted free speech doctrine remains foremost.

C. *Privately-Initiated Organization of the Internet*

In anticipation of a government-based attempt to organize the Internet, the leaders of the Internet should privately take initiative to order its content. In so doing, these entities would avoid governmental bureaucracy and ensure their input is determinative in the new Internet's structure.

1. *Motivation for Self-organization.*—With federal courts ruling in favor of objectors to both the CDA and COPA, there would not seem to be great incentive for privately-initiated steps to be taken toward the goal of organization. However, there are myriad reasons for the private leaders of the Internet to take the first steps toward structuring the Internet.

First, the alternative of government-based organization is dangerously inefficient. With the dynamic, near-exponential growth of the Internet, any proposed plan for organization must be refined and implemented as quickly as possible. For an example of the government's competency when dealing with technological matters, one need look no further than the case of *Sable Communications of California v. FCC*.¹⁶² In that case, the FCC considered the matter of free speech over the telephone in the "dial-a-porn" context. Including the time for litigation of the FCC standards, it had taken eight years to finalize the industry guidelines for a relatively simple blocking technology.¹⁶³ This time lapse would render any organization proposal useless in light of the unprecedented growth and ubiquity of the Internet.

Second, the entities most likely to create fair, manageable, and meaningful solutions are those entrenched in the Internet. The technological, educational, and commercial leaders of the Internet are more knowledgeable about the existing technology and potential development concerns than the government because of their proximity to these issues. It is reasonable to presume that these entities would be best suited to create a logical, functional structure for the Internet.

Finally, those entities at the forefront of supporting such organization would likely be rewarded with a favorable response in public sentiment. The public

160. *Smith v. United States*, 431 U.S. 291, 300-01 (1977).

161. Kipness, *supra* note 15, at 419.

162. 492 U.S. 115 (1989).

163. Jerry Berman & Daniel Weitzner, *CDT Analysis of the Communications Decency Act Passed by the Senate*, CENTER FOR DEMOCRACY AND TECHNOLOGY, at http://www.cdt.org/speech/cda/950615exon-coats_analysis.html (n.d.) (copy on file with author).

relations of these entities, as well as the Internet generally, might be recognized for their concern over growing problems and their keen consideration of the public's welfare in acting without government intervention. At a time when many have been economically disillusioned by the short-term failure in the Internet's commercial proficiency, such an altruistic act may serve to mitigate public perceptions of self-serving malevolence.

2. *Parties That Must Be Involved in the Organization Effort.*—A proper discussion of privately-based organization of the Internet begs the question of which entities will be represented in such an authoritative body. Intuitively, those entities serving in such a capacity must be made up of those willingly taking initiative to be involved in an organization effort.¹⁶⁴ At minimum, this body would need to have the support of the top Internet Service Providers (ISPs) and “community” sites¹⁶⁵ so that any determinations could be enforced. Such support would coerce other Internet entities into participation, since ISPs and community sites could threaten to filter uncooperative sites at the point of service.¹⁶⁶ In addition to these entities, it would be prudent to include representatives from academia and government—specifically military intelligence—since these two entities were involved in the creation of the Internet. The cooperative power-sharing nature of such a body would ensure that government officials would not be acting in a purely regulatory manner. The primary function of such a commission would be to develop an organizational structure for the Internet comprised of a fixed number of TLDs and to create a review body that would aid in the classification of websites into appropriate TLDs.

D. Top Level Domains Represent Technologically Feasible Method of Internet Organization

Currently, websites are distinguished according to the identity of the site's owner, who then qualifies for one of a limited number of TLDs. Until recently, private individuals or institutions could only register websites with TLDs of dot-com, dot-net, or dot-org.¹⁶⁷ However, the issue of website addresses on these TLDs has been in a state of disarray since the mid-1990's.¹⁶⁸ There have been

164. The Clinton Administration recognized that without online industry support, regulation or organization of Internet content will be met with a “nationwide backlash that could stunt the growth” of the Internet. *Gore at Summit Conference Sets Kids Online Policy*, COMM. DAILY, Dec. 3, 1997 (quoting Al Gore), available at 1997 WL 13781201.

165. Such as America OnLine, Yahoo, Microsoft Network, or Lycos.

166. See *Policing Obscenity*, *supra* note 6, at 711 (providing panel comments by Jonathan Zittrain, stating that this “vertical portability” is a disadvantage of current filtering technology).

167. David J. Stewart & Robert L. Lee, *Foreign-Character Domain Names and New Top-Level Domains Create More Trademark Issues*, GigaLaw.com, Nov. 2000, at <http://www.gigalaw.com/articles/stewart-2000-11-p3.html>. This is the third web page of a three-page article. The full text of the article is on file with author.

168. McCullagh, *supra* note 154.

several suggestions for creating only a dot-xxx or dot-sex extension,¹⁶⁹ but this action alone may infringe on the rights of established sites based on an Equal Protection argument.¹⁷⁰ While this argument is suspect,¹⁷¹ the broader goal of organizing the Internet is more effectively accomplished by creating a fixed number of TLDs within which all websites would be required to exist.

1. *Current TLDs Are Being Expanded by ICANN.*—In response to the saturation of the dot-com TLD,¹⁷² ICANN has recently approved seven new TLDs for registering websites.¹⁷³ However, their creation of more TLDs fails to further the organization of the Internet. By simply creating new TLDs without also providing some incentive for websites to realign, ICANN has succeeded in merely contributing to the Internet's chaos and fostering confusing, cumbersome navigation of its content.¹⁷⁴ For any organization proposal to truly be effective, there must either be an overwhelming incentive for existing websites to adopt a new TLD or there must be some tangible penalty for refusing the new structure.

2. *Suggestion for TLDs That Could be Created.*—To begin, Congress must first repeal the act providing ICANN with sole power to manage TLDs, and reassign this power to the aforementioned, privately-organized commission.¹⁷⁵ As a suggested starting point, the commission could create ten different TLDs that permit private registration.¹⁷⁶ This would in no way effect the sites owned by the government or educational facilities. The selected TLDs might include dot-kid, dot-teen, dot-xxx,¹⁷⁷ dot-adult, dot-mature, dot-shop, dot-biz, dot-me, dot-news, or dot-research. Any applicant for a website might be required to select up to three TLDs that they feel best represent the target audience or type of activity that will take place on their site. It would then be the responsibility of a review board to evaluate the application—including a sample of the

169. *Id.*

170. See Glenn E. Simon, *Supreme Court Review: Cyberporn and Censorship: Constitutional Barriers to Preventing Access to Internet Pornography by Minors*, 88 J. CRIM. L. & CRIMINOLOGY 1015, 1046-48 (1998).

171. COHEN & VARAT, *supra* note 64, at 672 (noting that the Court has defended under-inclusive statutes from narrowly tailored arguments by stating that the legislature may attack a general problem in a piecemeal fashion). See discussion *supra* Part I.B.

172. Joanna Glasner, *Do We Really Need New Domains?*, WIRED, Nov. 17, 2000, at <http://www.wired.com/news/print/0,1367,40242,00.html>.

173. The approved TLDs were: dot-biz, dot-info, dot-name, dot-pro, dot-museum, dot-aero, and dot-coop. Oscar S. Cisneros, *ICANN: The Winners Are . . .*, WIRED, Nov. 16, 2000, at <http://www.wired.com/news/politics/0,1283,40228,00.html>.

174. The confusion has been multiplied by the presence of "alternative" TLD providers, who have begun offering unauthorized TLDs for sale. See Andy Patrizio, *Confusion is Domain Problem*, WIRED, Mar. 14, 2001, at <http://www.wired.com/news/business/0,1367,42373,00.html>.

175. See generally McCullagh & Sager, *supra* note 20.

176. See generally Patrizio, *supra* note 174; Rebecca Vesely, *Word's Out: Time to Change Domain-Name System*, WIRED, Aug. 22, 1997, at <http://www.wired.com/news/politics/0,1283,6297,00.html>.

177. See generally McCullagh, *supra* note 146.

website's code—to determine which TLD should be assigned.

The dot-kid TLD could be set aside for content specifically targeted toward or in the interest of children, such as Sesame Street, Nickelodeon, or websites for cartoons.¹⁷⁸ Similarly, the dot-teen TLD would be comprised of pages with content specifically targeted toward teenage interests.¹⁷⁹

Internet sites containing sexually-oriented material could utilize either a dot-xxx, dot-adult, or dot-mature extension.¹⁸⁰ The distinguishing factors relating to which TLD is appropriate would be contingent on the nature of the sight itself. If the sight engages in commercial pornographic activity, sells membership that grants access to pornographic material, or is otherwise in receipt of consideration from a user in exchange for pornographic material, then the dot-xxx TLD would be appropriate. In contrast, if the website is designed so that pornographic material is accessible without charge, or sexually explicit interchange regularly occurs on a chat portion of the site, then a dot-adult TLD may be appropriate. Finally, if the website contains non-pornographic information or discussion relevant to educating and opining on issues of sexuality, the dot-mature TLD may be appropriate. A recognizable concern with these TLDs is that they may be viewed as a blemish on the commercial viability of the website, similar to an NC-17 rating for films. However, the very nature of the Internet relieves this fear of being branded or punished because of the specific TLD, rendering this concern invalid.¹⁸¹

Additionally, the dot-shop TLD could be created to house Internet websites generally engaged in business-to-consumer or consumer-to-consumer transactions, such as Amazon or Ebay, respectively. Should the online entity engage in the sale of pornographic and non-pornographic items, a separate TLD could be assigned depending on the items for sale.¹⁸² The dot-biz TLD would intend to represent a pure version of the dot-com TLD. Specifically, this TLD would house much of the information from existing commercial entities desiring a web presence, but not necessarily engaging in a significant amount of online sales.¹⁸³

Further, the dot-me TLD could be created to house all personal websites. These websites would be characterized by individual or small-group ownership engaging in no commercial activity. The dot-news TLD would house much of the information disseminated by news organizations, including information on global and local news, sporting events and commentary, and weather. Finally,

178. 178 See Oscar S. Cisneros, *No Porn Wanted at .Kids*, WIRED, Oct. 2, 2000, at <http://www.wired.com/news/business/0,1367,39169,00.html>.

179. Such as www.teen.com, www.teenpregnancy.org, and www.teenvoices.com.

180. See generally Chris Stamper, *.XXX Marks the Porn Site*, ABCNews.com, July 20, 1998, at <http://more.abcnews.go.com/sections/tech/dailynews/dotxxx970715.html>. (copy on file with author).

181. See discussion *infra* Part IV.A.

182. Thus, in the Ebay example, Ebay.sale might have general goods for auction, while Ebay.xxx would have pornographic material for auction.

183. Representative businesses include Coke, Nike, General Motors, and Microsoft.

the dot-research TLD could be an extension dedicated to any information relevant to the various types of academic research.

These TLDs are provided purely as potential examples, and intend to show the type of broad categories it might be appropriate to create. Inevitably, there will be websites that either do not clearly fit into any of the created TLDs or whose material overlaps a number of possible TLDs. The first problem would have to be dealt with using the aforementioned application review board and relying on their combined discretion. While assignments could be potentially appealed,¹⁸⁴ the applicant would suffer no impingement of their free speech rights since the material would still be accessible by any interested party. The latter problem could be dealt with easily by securing the same secondary domain—the “hotmail” portion in hotmail.com—with appropriate TLDs.

3. *Persuading Existing Entities to Change TLDs.*—The most favorable approach to accomplishing this arduous task of reorganization, while maintaining fairness to existing websites, is to require all websites to re-register under one of the newly created TLDs. To respect the value of the existing websites’ name recognition, all current websites would have the opportunity to claim their choice of a new TLD prior to general registration. Further, to prevent websites from capitalizing on users’ predilection to default to the dot-com, dot-net, or dot-org TLDs, these old TLDs would not be included in the new series of options.

The actual requirement for existing websites to re-register using a newly created TLD can be enforced through two methods. As noted previously, the commission could threaten supply-side filtering of any site not complying with such a proposal. This means that the ISP would prevent access to the website by displaying an error message when users attempt to access the website.¹⁸⁵ Technologically, this could be easily accomplished by filtering any website carrying an old TLD extension. In the alternative, the commission could simply rely on favorable public sentiment and pressure on Internet sites to comply with a plan for organization. However, this latter method of enforcement is likely to be effective only if there is significant support from Internet and government entities initially.

V. ADVANTAGES AND DISADVANTAGES OF ORGANIZATION VIA NEW TLDs

A. *Advantages of Organization Over User-Based Filtering*

1. *Organization Represents the Least Restrictive Means of Furthering Legitimate State Interests.*—Constitutionally, one of the most important advantages to the organization of the Internet using new TLDs is that it represents the least restrictive means of accomplishing one of the government’s compelling interests: prohibiting children’s access to pornography on the

184. See *Policing Obscenity*, *supra* note 6, at 714 (panel comments by Deirdre Mulligan).

185. See *id.* at 711 (panel comments by Jonathan Zittrain, stating that such “vertical portability” is a disadvantage of current filtering technology).

Internet.¹⁸⁶ Under a highly organized construction, this interest is furthered by empowering users to make important decisions about what TLDs will be accessible. In this way, the government is not imposing any restriction in the traditional sense; rather, this is left to the individual end user or local community.¹⁸⁷

2. *Organization of Cyberspace Does Not Have the Same Potential Detrimental Effects to Commerce as Zoning.*—In the past thirty years, the Supreme Court has heard several cases regarding zoning ordinances for sexually-oriented businesses.¹⁸⁸ These ordinances have been largely upheld because they focused on the furtherance of compelling state interests: the deleterious secondary effects on the community of such businesses.¹⁸⁹ It has been argued that these secondary effects do not exist for the Internet because these concerns are only appropriate for the physical world.¹⁹⁰ While secondary effects such as inefficiency and user displeasure may be too attenuated for an analogous argument, there is a wholly different perspective appropriate for organization versus zoning.

The private nature of accessibility to the Internet may have eliminated concern over decreasing property values and increased crime rates at the dissemination point of sexually-oriented material, but this trait also alleviates the commercial effects of labeling a merchant as a sexually-oriented website.¹⁹¹ Since speech would be segmented—not stifled or suppressed—the purveyor of pornographic material would be unable to make valid First Amendment arguments.¹⁹²

3. *Local Communities Would Again Be Empowered to Utilize the Miller Obscenity Test.*—The globalization that results from the Internet's ubiquity essentially strips the *Miller* test for obscenity of its legal effect,¹⁹³ as it is dependant on a reasonable person's analysis of the material based on local community standards. Another advantage of organizing the Internet by TLDs is that local communities could implement an Internet filter for ISPs located within their jurisdiction. ISPs simply provide a service to the local community, and therefore are subject to the community standards applicable to their point of business.¹⁹⁴ For those ISPs offering land-based access, local communities could

186. See, e.g., *Ginsberg v. New York*, 390 U.S. 629 (1968).

187. See Stamper, *supra* note 180.

188. See, e.g., *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *Renton v. Playtime Theatres*, 427 U.S. 41 (1986); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50 (1976).

189. See *Renton*, 475 U.S. at 48.

190. *Reno II*, 521 U.S. 844, 888-90 (1997) (O'Connor, J., concurring in part, dissenting in part).

191. See discussion *infra* Part IV.A.

192. See discussion *infra* Parts I, III.A.

193. Kipness, *supra* note 15, at 419.

194. See Aaron Craig, *Gambling on the Internet*, 1998 COMP. L. REV. & TECH. J. 61, 75 (1998) (discussing authority to enforce gambling laws against ISPs). See generally Jeffrey Yeates, *CALEA and the RIPA: The U.S. and the U.K. Responses to Wiretapping in an Increasingly Wireless World*,

require filtering of designated TLDs according to community standards. Further, the Internet's flexibility would also allow for such filtering to occur dependant on the time of day, similar to generally accepted broadcast policies.

Finally, the numerous methods of accessing the Internet ensure that speech would not be stifled. If an end user does want to access material that has been filtered by their community, they could subscribe to a national satellite provider or dial into an ISP located in another community. Children trying to access pornography using similar methods could be prohibited by parental restraints on which ISP will service the household. These alternatives would also assuage concerns over the dicta from *Stanley v. Georgia*,¹⁹⁵ which implied that mere possession of pornography reaching the obscene level in one's home may not be criminal. Once again, local communities would have the opportunity to determine what material is obscene according to current standards for that particular geographic location.

4. *Overall Efficiency and Clarity of the Internet Would Be Improved.*—Closely related to the issue of a local community's ability to set obscenity standards is the right of commercial, educational, and governmental entities to filter Internet content. Such institutions may want to filter certain content for many reasons, including the desire to promote professionalism, the threat of sexual harassment suits, and overall productivity. If an engineering firm, college, or local library determines that there is no reason for any of its potential users to be able to access commercial pornography, then they could filter the particular TLD(s) providing such access. Productivity may be increased in a two-fold fashion: unrelated material would be inaccessible and relevant material would be more easily identified, with aid from the TLD designation itself.

Additionally, by using TLDs to organize material, as opposed to an encoded rating system,¹⁹⁶ the public would be clearly apprised of material that they may want to filter. Such user-friendliness is vital as an increasing number of Internet users have a limited level of computer literacy.

5. *Current Methods of Restricting Access to Internet Content Have Numerous Flaws.*—Currently, user-based regulation of Internet content is primarily accomplished by using one of the numerous commercial filtering programs. Preliminarily, it is worth noting that the success of any user-based regulation that is dependent on parental knowledge of computers is suspect, since children are often more technology-literate than their parents.¹⁹⁷ However, filtering programs have many other disadvantages that diminish their effectiveness and precision, including potential over-filtering, unclear standards

12 ALB. L.J. SCI. & TECH. 125, 2001 (discussing recent communication statutes and their enforceability against communication entities, including ISPs).

195. 394 U.S. 557 (1969).

196. Reno I, 929 F. Supp. 824, 838-39 (E.D. Pa. 1996), *aff'd*, Reno II, 521 U.S. 844 (1997).

197. *Regulating the Internet*, *supra* note 16, at 355 (Panel comments of Richard A. Kurnit, supported by John Zipperer, *The Naked City: Cyberporn Invades the American Home*, CHRISTIANITY TODAY, Sept. 12, 1994, at 48).

for filtering, and missed websites.¹⁹⁸ The first concern springs from the nature of purchasing prepackaged software: the consumer is purchasing the standards of the software developer,¹⁹⁹ which have been developed with little input from the websites themselves. By creating an application system for the TLDs, users would enjoy the benefit of the websites' self-assessment of their content, yielding more precise filtering. Also, the websites themselves would be cognizant of their status, who is filtering them, and what they might change to be eligible for a different TLD.²⁰⁰ Finally, since there would be an application process for all registering websites, there would be no opportunity for a new site to have an Internet presence undetected by dated filtering software.

Another proposed technique for restricting access to specific Internet content is the class of age-verification techniques.²⁰¹ However, not only has the Court recognized that these techniques threaten the availability of indecent material to consenting adults,²⁰² they are also not the least restrictive means by which the content can be kept from minors.²⁰³ Reorganization under new TLDs would present the least restrictive means for accomplishing this goal since it effectively places the onus for filtering on the parent or individual user, but enables them to do so easily and efficiently.

6. *Little Technological Knowledge Is Required by the End User.*—One intuitive requirement of any proposal incorporating new technology is that the end user be able to employ it in a meaningful way. Creating new TLDs permits organization and user-side filtering to take place without requiring detailed knowledge of how the Internet or filtering technology works. Functionally, the user would be able to filter TLDs using a simple drop-down menu and by supplying a password. Further, the browser could be designed to report any changes in the TLD filtering standards so parents could truly monitor what websites are being accessed by their children.

B. Disadvantages

1. *Logistical Implementation Would Require Time, Effort, Money, and Unified Support.*—Perhaps the most apparent disadvantage or barrier to implementing such a proposal is the large amount of work and support that would be required. The time and effort required to establish a commission alone may be prohibitive. Such a commission would also require funding to staff personnel to carry out its resolutions. Further, for such a commission to function effectively, there would have to be unified support from the majority of the Internet entities. However, the alternative of inaction presents many problems

198. See *Policing Obscenity*, *supra* note 6, at 711 (panel comments by Jonathan Zittrain).

199. See *id.* at 714 (response comments by Deirdre Mulligan).

200. See *id.* (noting current site owners' inability to know when they are filtered and how to petition for unfiltered status).

201. *Reno I*, 929 F. Supp. 824, 839-42 (E.D. Pa. 1996), *aff'd*, *Reno II*, 521 U.S. 844 (1997).

202. *Id.* at 846-47.

203. *Id.* at 855-56.

of its own by promoting the inefficiency and disarray of the Internet. Also, *any* solution that is proposed will require the capital and support mentioned.

2. *Existing Internet Entities Will Perceive Loss of Name Recognition.*—Another objection that surely will be raised in the face of forcing websites to change TLDs is the perceived loss of name recognition. This is a powerful economic argument, as the first entity to secure name recognition in a particular field enjoys public attention, and perhaps a de facto monopoly. However, by forcing all websites to relocate, no existing website will lose name recognition disproportionately with another website. That is, Toyota need not be concerned that potential consumers will be able to access honda.com, but not toyota.com. To further mitigate this concern, if a user would input an address using an old TLD, a page used to redirect them to the appropriate site could be implemented similar to an out-of-service message used in the telephone industry. Such a page could alert the user of the change in TLDs, and if there are numerous secondary level domains with the same TLD, the page could include a brief description of each site.

3. *Creating TLDs May Legitimize Obscenity.*—Finally, a legitimate concern surrounding the creation of new TLDs specifically aimed at organizing sexually-oriented material is that such an act furthers the legitimization of obscene pornography in our society's psyche.²⁰⁴ To the contrary, by enabling local communities and individual users to employ the *Miller* test in a meaningful way, obscenity is restrained to its rightful place: outside the veil of constitutional protection. An Internet constructed with various TLDs allows the local government to enforce its standards for obscenity, without circumvention and infiltration by suspect standards found in other parts of the world.

CONCLUSION

The Internet has been called the greatest experiment in First Amendment principles of free speech and free press.²⁰⁵ It is the responsibility of modern society and government not to fail.²⁰⁶ The proposal for creating new TLDs and organizing the Internet into a manageable system is admittedly optimistic, but the alternative of relying on invisible market forces to drive the Internet's organization is simply unrealistic. It is prudent to take action now, while the Internet is still in its relative infancy. Should there be delay, the incentive to take affirmative actions will diminish, as this incentive is inversely proportional to the size of the Internet. Further, should their latest attempt at regulation be declared unconstitutional, it is inevitable that Congress will once again try their hand at crafting legislation that will pass constitutional muster.

The Internet is indeed the greatest speech-enabling technology that man has ever developed.²⁰⁷ However, this empowerment raises the concern of whether the

204. Stamper, *supra* note 180.

205. *Regulating the Internet*, *supra* note 16, at 353 (panel comments of Mike Godwin).

206. *Id.*

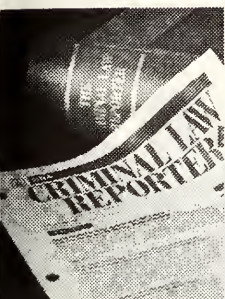
207. *Policing Obscenity*, *supra* note 6, at 696 (panel comments by Ann Beeson).

global community wants to or should be able to hear everything that is said. Some may charge that this is a blatant cry for censorship. The challenge for these accusers is to resist popular rhetoric, and remember: free speech has limitations. For these constitutional limitations to remain efficacious in the future, local communities must reclaim their ability to determine their own contemporary standards. The creation of new TLDs, coupled with the cancellation of most existing TLDs, would accomplish this goal.

Finally, as a challenge to the judiciary, it may now be appropriate to strengthen the *Miller* test by creating an objective standard for obscenity. While the mere suggestion of such a standard raises federalism concerns, some commentators have alleged that the current subjectivity has rendered the *Miller* test “spongy” and ineffective.²⁰⁸ If this continues to be the measure for determining what is obscene, then obscenity means nothing. Drawing lines is not an enjoyable or easy task, but it is an integral part of creating good law. Under a malleable definition of obscenity, it is only a matter of time and soft resolve before bedrock principles—such as the prohibition against child pornography—are compromised.²⁰⁹

208. See Richard A. Posner, *Law and Literature: A Misunderstood Relation* (1988). “[T]he operative legal tests for obscenity are spongy and leave much to the vagaries of juries asked to evaluate expert testimony on literary merit, offensiveness, and other unmeasurables.” *Id.* at 329.

209. For further review of current efforts to erode the child pornography prohibition, see *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). This case concerns the question of constitutional protection of “virtual” child pornography.



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